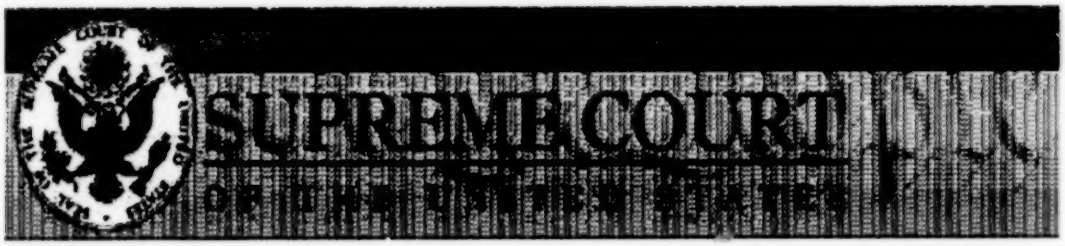
DOCKET



No. 13-517

Title:	Gregory P. Warger, Petitioner
	v.
	Randy D. Shauers
Docketed:	October 24, 2013
Lower Ct:	United States Court of Appeals for the Eighth Circuit
Case Nos.:	(12-1846)
Decision Date:	July 24, 2013

Questions Presented

--- Date---	------ Proceedings and Orders----------
Oct 22 2013	Petition for a writ of certiorari filed. (Response due November 25, 2013)
Nov 12 2013	Order extending time to file response to petition to and including December 26, 2013.
Dec 19 2013	Brief of respondent Randy D. Shauers in opposition filed.
Jan 8 2014	DISTRIBUTED for Conference of January 24, 2014.
Jan 8 2014	Reply of petitioner Gregory P. Warger filed. (Distributed)
Jan 21 2014	Record Requested.
Jan 30 2014	Record received from the U.S.C.A. 8th Circuit (1 envelope).
Feb 3 2014	Record received from the U.S.D.C. South Dakota (1 box).
Feb 5 2014	DISTRIBUTED for Conference of February 21, 2014.
Feb 24 2014	DISTRIBUTED for Conference of February 28, 2014.
Mar 3 2014	Petition GRANTED.
Mar 28 2014	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the petitioner.
Apr 7 2014	The time to file the joint appendix and petitioner's brief on the merits is extended to and including May 27, 2014.
Apr 7 2014	The time to file respondent's brief on the merits is extended to and including August 6, 2014.
May 27 2014	Joint appendix filed. (Statement of costs filed.)
May 27 2014	Brief of petitioner Gregory P. Warger filed.
Jun 3 2014	Brief amici curiae of Professors of Law filed.
Jun 3 2014	Brief amicus curiae of National Association of Criminal Defense Lawyers filed
Jul 9 2014	Record requested from U.S.C.A. 8th Circuit.
Jul 17 2014	Record received from U.S.C.A. 8th Circuit. 1 envelope.
Jul 21 2014	SET FOR ARGUMENT Wednesday, October 8, 2014
Aug 6 2014	Brief of respondent Randy D. Shauers filed.

Aug 11 2014	Brief amici curiae of Law Professors filed.
Aug 12 2014	Brief amicus curiae of American Association for Justice filed. (Distributed)
Aug 13 2014	Brief amicus curiae of the United States filed.
Aug 13 2014	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Aug 14 2014	CIRCULATED.
Sep 5 2014	Reply of petitioner Gregory P. Warger filed. (Distributed)
Oct 2 2014	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Oct 8 2014	Argued. For petitioner: Kannon K. Shanmugam, Washington, D. C. For respondent: Sheila L. Birnbaum, New York, N. Y.; and Sarah E. Harrington, Assistant to the Solicitor General, Department of Justice, Washington, D. C. (for United States, as amicus curiae.)

PETITION FOR WRIT OF CERTIORARI

No. 13-517

In the Supreme Court of the United States

GREGORY P. WARGER, PETITIONER

v.

RANDY D. SHAUERS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

STEVEN C. BEARDSLEY
GARY D. JENSEN
BEARDSLEY, JENSEN & VON WALD, P.L.L.C.
4200 Beach Drive, Suite 3
P.O. Box 9579
Rapid City, SD 57709

KANNON K. SHANMUGAM
Counsel of Record
JAMES M. MCDONALD
ELI SAVIT
WILLIAMS & CONNOLLY LLP
725 Twelfth Street, N.W.
Washington, DC 20005
(202) 434-5000
kshanmugam@wc.com

QUESTION PRESENTED

Whether Federal Rule of Evidence 606(b) permits a party moving for a new trial based on juror dishonesty during voir dire to introduce juror testimony about statements made during deliberations that tend to show the alleged dishonesty.

TABLE OF CONTENTS

Page

Opinions below 1

Jurisdiction 1

Rule involved 2

Statement 2

Reasons for granting the petition 8

A. The decision below deepens a circuit conflict on the admissibility of juror testimony about statements made during deliberations that tend to show juror dishonesty during voir dire 9

B. The question presented is an important one that warrants the Court's review in this case 17

Conclusion 20

Appendix A 1a

Appendix B 12a

Appendix C 40a

TABLE OF AUTHORITIES

Page

Cases:

Hard v. *Burlington Northern Railroad*, 812 F.2d 482 (9th Cir. 1987) ..... *passim*

Maldonado v. *Missouri Pacific Railway Co.*, 798 F.2d 764 (5th Cir. 1986), cert. denied, 480 U.S. 932 (1987) 13

McDonough Power Equipment Inc. v. *Greenwood*, 464 U.S. 548 (1984) 17

United States v. *Benally*, 546 F.3d 1230 (10th Cir. 2008), reh'g denied, 560 F.3d 1151 (10th Cir. 2009), cert. denied, 558 U.S. 1051 (2009), and 132 S. Ct. 401 (2011) ... *passim*

United States v. *Boney*, 68 F.3d 497 (D.C. Cir. 1995) 12, 15, 17, 18

Page

Cases—continued:

United States v. *Henley*,
238 F.3d 1111 (9th Cir. 2001) 11, 14, 15
United States v. *Villar*, 586 F.3d 76 (1st Cir. 2009) 19
Williams v. *Price*, 343 F.3d 223 (3d Cir. 2003) 9, 15, 16

Statute and rules:

28 U.S.C. 1254(1) 1
Fed. R. Evid. 606 10
Fed. R. Evid. 606(b) ..... *passim*
Fed. R. Evid. 606(b)(1) ..... *passim*
Fed. R. Evid. 606(b)(2) ..... *passim*
Fed. R. Evid. 606(b)(2)(A) 6, 7
Fed. R. Evid. 606(b)(2)(B) 6
Fed. R. Evid. 606 advisory committee's note (2011) 10

In the Supreme Court of the United States

No.

GREGORY P. WARGER, PETITIONER

v.

RANDY D. SHAUERS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Gregory P. Warger respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-11a) is reported at 721 F.3d 606. The order of the district court denying petitioner's motion for judgment as a matter of law or a new trial (App., *infra*, 12a-39a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 24, 2013. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

RULE INVOLVED

Federal Rule of Evidence 606(b) provides:

> (1) **Prohibited Testimony or Other Evidence.** During an inquiry into the validity of a verdict or indictment, a juror may not testify about any statement made or incident that occurred during the jury's deliberations; the effect of anything on that juror's or another juror's vote; or any juror's mental processes concerning the verdict or indictment. The court may not receive a juror's affidavit or evidence of a juror's statement on these matters.
>
> (2) **Exceptions.** A juror may testify about whether:
>
> (A) extraneous prejudicial information was improperly brought to the jury's attention;
>
> (B) an outside influence was improperly brought to bear on any juror; or
>
> (C) a mistake was made in entering the verdict on the verdict form.

STATEMENT

This case presents an expressly recognized circuit conflict on a recurring question of interpretation involving Federal Rule of Evidence 606(b). Petitioner brought suit against respondent in the United States District Court for the District of South Dakota after respondent's truck collided with petitioner's motorcycle, resulting in the amputation of petitioner's leg. In response to questioning during voir dire, the woman who later became the jury foreperson stated that she could remain impartial and that she could award damages to petitioner if the evidence supported it. During deliberations, however, the foreperson told the other jurors that her own daughter had been at fault in a fatal automobile accident—and

that, if her daughter had been sued, it would have "ruined her life." The jury returned a verdict in favor of respondent. After obtaining an affidavit from another juror in which the juror reported the foreperson's statements during deliberations, petitioner moved for a new trial based on the foreperson's dishonesty during voir dire.

The district court denied petitioner's motion for a new trial, App., *infra*, 12a-39a, and the Eighth Circuit affirmed, *id.* at 1a-11a. Like other courts before it, the Eighth Circuit recognized that "[t]here is a split among the circuits as to whether [juror] testimony may be used" to seek a new trial based on juror dishonesty during voir dire. *Id.* at 8a. In the decision below, the Eighth Circuit joined the Tenth Circuit, and departed from the Ninth and District of Columbia Circuits, in holding that such testimony is not admissible under Federal Rule of Evidence 606(b). *Id.* at 8a-9a. In dicta, moreover, other circuits have lined up on each side of the conflict. The resulting conflict, on an important question of interpretation involving a federal rule, warrants this Court's review.

1. On August 4, 2006, petitioner, a computer systems engineer and former Navy officer, was involved in a traffic accident with respondent at the intersection of U.S. Highway 385 and Sheridan Lake Road in Pennington County, South Dakota, not far from Mount Rushmore. Respondent's truck, which was pulling a 28-foot camper trailer, clipped petitioner's motorcycle as respondent was attempting to pass petitioner at a high rate of speed. An off-duty officer saw the accident and raced to the scene. When the officer came upon petitioner, he was missing part of his left leg. Petitioner's lower leg was amputated, and he suffered numerous other serious injuries. App., *infra*, 2a, 12a-13a; Pet. C.A. Br. 3, 6-11.

2. On December 12, 2008, petitioner brought suit against respondent in the United States District Court for the District of South Dakota, invoking the court's diversity jurisdiction and asserting a claim of negligence. App., *infra*, 2a, 13a.

The case twice went to trial before a jury. The first trial ended in a mistrial after respondent's attorney violated an order prohibiting experts from offering legal opinions as to whether the parties' conduct violated South Dakota law. App., *infra*, 2a, 13a-14a.

During voir dire for the second trial, petitioner's counsel asked the prospective jurors whether there was any reason why they could not remain fair and impartial in a case of this type. Petitioner's counsel also inquired as to whether there was any reason that each juror could not vote in petitioner's favor. Petitioner's counsel specifically inquired as to whether each juror could vote to award damages for future medical expenses or pain and suffering if the evidence supported such an award. All of the jurors who were empaneled—including Regina Whipple, the juror who was later selected as the foreperson—indicated that they could remain fair and impartial and that they could award damages against respondent if the evidence supported it. Tr. 52-61, 77, D. Ct. Dkt. 197 (Sept. 20, 2010).

The case proceeded to trial. At the conclusion of the trial, the jury returned a verdict in favor of respondent. App., *infra*, 3a, 14a.

3. Less than a week after the jury returned its verdict, one of the jurors, Stacey Titus, stopped by the office of petitioner's counsel in Rapid City. After the district court permitted jurors and counsel to have contact, Mr. Titus met with petitioner's counsel. He expressed concern about the jury's deliberations—and, in particular, expressed concern that the jury foreperson, Ms. Whip-

ple, had not decided the case based on the evidence presented. App., *infra*, 3a, 28a; C.A. App. 121.

Specifically, Mr. Titus alleged that, during deliberations, Ms. Whipple had told the other jurors that her own daughter had been at fault in a fatal automobile accident—and that, if her daughter had been sued, it would have "ruined her life." According to Mr. Titus, Ms. Whipple explained that her daughter had visited with the family of the dead motorist and had given them flowers on the fifth anniversary of the accident. In Mr. Titus's view, Ms. Whipple's statements had influenced other jurors, because those jurors "also expressed their concern about ruining the * * * li[ves] [of respondent and his wife] as they were a young couple." Mr. Titus executed an affidavit in which he made all of the foregoing allegations. App., *infra*, 40a-41a (affidavit).

4. As is relevant here, relying on Mr. Titus's affidavit, petitioner moved for a new trial based on the foreperson's dishonesty during voir dire. The district court denied the motion, based on its conclusion that Federal Rule of Evidence 606(b) barred the admission of Mr. Titus's affidavit. App., *infra*, 12a-39a.[1]

The district court held that the affidavit was inadmissible under Rule 606(b)(1), which prohibits the introduction of juror testimony about statements made during jury deliberations "[d]uring an inquiry into the validity of [the] verdict." App., *infra*, 35a-38a. In so doing, the court rejected petitioner's contention that he was seeking admission of the affidavit not to "inquire into the va-

---

[1] Petitioner also moved for judgment as a matter of law or a new trial on other grounds. The district court rejected those arguments, see App., *infra*, 14a-27a, as did the court of appeals, see *id.* at 3a-5a, 6a. Petitioner does not renew those arguments before this Court.

lidity of the verdict," but rather to "demonstrate the foreperson lied during voir dire." *Id.* at 35a-36a. The district court noted that the Tenth Circuit had "recently addressed this precise issue" and held that such testimony "fell within the ambit of Rule 606(b) because the jurors made the statements during the course of jury deliberations, regardless of the purpose for which [the moving party] sought to use the information." *Ibid.* (citing *United States* v. *Benally*, 546 F.3d 1230 (10th Cir. 2008), cert. denied, 558 U.S. 1051 (2009), and 132 S. Ct. 401 (2011)). While acknowledging that the Ninth Circuit had expressed a contrary view, *id.* at 37a-38a (citing *Hard* v. *Burlington Northern R.R.*, 812 F.2d 482, 485 (9th Cir. 1987)), the district court found the Tenth Circuit's reasoning to be "persuasive." *Id.* at 38a. The district court explained that "[t]o allow statements made during jury deliberations to be used to challenge a juror's conduct during voir dire would undermine the purpose of Rule 606(b) and runs counter to its directive." *Ibid.*

The district court also held that, to the extent the affidavit was inadmissible under Rule 606(b)(1), it did not qualify for admission under any of the exceptions in Rule 606(b)(2): specifically, the exceptions for evidence that "extraneous prejudicial information was improperly brought to the jury's attention," Fed. R. Evid. 606(b)(2)(A), and evidence that "an outside influence was improperly brought to bear on any juror," Fed. R. Evid. 606(b)(2)(B). App., *infra*, 31a-35a. The court determined that "[t]he type of biases the foreperson allegedly expressed in this case, while unfortunate, do not fall within any exception to Rule 606(b)." *Id.* at 34a (citing *Benally*, 546 F.3d at 1236-1238).

5. The court of appeals affirmed. App., *infra*, 1a-11a. Like the district court, the court of appeals rejected

the contention that Rule 606(b)(1) "should not exclude the affidavit because it is not being used to challenge the verdict, but rather to show a juror was dishonest during voir dire." *Id.* at 8a. At the outset, the court of appeals acknowledged that "there is a split among the circuits as to whether [juror] testimony may be used" to seek a new trial based on juror dishonesty during voir dire. *Ibid.* In particular, the court noted that the Ninth Circuit had held that "statements by jurors regarding dishonesty during voir dire may be admitted into evidence for the purpose of challenging a verdict," *ibid.* (citing *Hard*, 812 F.2d at 485), while other courts (including the Tenth Circuit) had held that "trial courts may exclude such evidence," *id.* at 8a-9a (citing *Benally*, 546 F.3d at 1235-1236). The court of appeals found the reasoning of the latter courts to be "persuasive." *Id.* at 9a. The court explained that "allowing juror testimony through the backdoor of a voir dire challenge risks swallowing the rule." *Ibid.* (quoting *Benally*, 546 F.3d at 1236).

Also like the district court, the court of appeals held that, to the extent the affidavit was inadmissible under Rule 606(b)(1), it did not qualify for admission under the exception in Rule 606(b)(2)(A) for evidence that "extraneous prejudicial information was improperly brought to the jury's attention." App., *infra*, 6a-7a. "Upon first blush," the court conceded, "it would seem the foreperson's comments fall into this category." *Id.* at 7a. The court ultimately determined, however, that "[j]urors' personal experiences do not constitute extraneous information." *Ibid.* Instead, "extraneous information includes objective events such as publicity and extra-record evidence reaching the jury room, and communication or contact between jurors and litigants, the court, or other third parties." *Ibid.* (internal quotation marks and citation omitted). Because the affidavit "concerns an al-

leged bias held by a jury member" and "does not concern extraneous information improperly brought before the jury," the court concluded that "the exception to the rule does not apply." *Ibid.*

REASONS FOR GRANTING THE PETITION

This case presents a mature conflict on an important and recurring question concerning the interpretation of Federal Rule of Evidence 606(b), the rule governing the admissibility of juror testimony about statements made during jury deliberations. In the decision below, the Eighth Circuit expressly recognized that it was deepening a preexisting conflict on the question whether a party moving for a new trial based on juror dishonesty during voir dire may introduce juror testimony about statements made during deliberations that tend to show the alleged dishonesty. While consistent with an earlier decision of the Tenth Circuit, the Eighth Circuit's decision conflicts with decisions from the Ninth and District of Columbia Circuits. And two other circuits have addressed the issue in dicta, with those circuits lining up on either side of the conflict.

That conflict, moreover, warrants the Court's review in this case. The question presented is of substantial practical importance. And this case is an optimal vehicle for consideration and resolution of that question, because it cleanly presents the full range of potential arguments as to why Rule 606(b) permits the introduction of juror testimony of the type at issue here. The petition for certiorari should therefore be granted.

A. The Decision Below Deepens A Circuit Conflict On The Admissibility Of Juror Testimony About Statements Made During Deliberations That Tend To Show Juror Dishonesty During Voir Dire

The Eighth Circuit's decision deepens a conflict among numerous courts of appeals on the admissibility of juror testimony about statements made during deliberations that tend to show juror dishonesty during voir dire. That conflict has been expressly recognized not only by the Eighth Circuit, but by many of the other courts and judges to have considered the issue. See, *e.g.*, *United States* v. *Benally*, 546 F.3d 1230, 1235 (10th Cir. 2008), reh'g denied, 560 F.3d 1151 (10th Cir. 2009), cert. denied, 558 U.S. 1051 (2009), and 132 S. Ct. 401 (2011); *Benally*, 560 F.3d at 1153-1154 (Briscoe, J., dissenting from denial of rehearing en banc); *id.* at 1156 (Murphy, J., dissenting from denial of rehearing en banc); *Williams* v. *Price*, 343 F.3d 223, 235 n.5 (3d Cir. 2003) (Alito, then-J.). Further review is warranted to resolve that conflict.

1. a. As the Eighth Circuit noted (App., *infra*, 8a), the Ninth Circuit has squarely held that Rule 606(b) permits a juror to testify about statements made during deliberations that tend to show juror dishonesty during voir dire.

Most notably, in *Hard* v. *Burlington Northern Railroad*, 812 F.2d 482 (1987), the Ninth Circuit rejected precisely the sort of argument that the Eighth Circuit accepted here. In the underlying suit, a railroad employee brought an action against his employer under the Federal Employers' Liability Act for injuries he suffered on the job. *Id.* at 483. The jury returned a verdict in the employee's favor, but found the employee 50% negligent and accordingly reduced its damages award. *Ibid.* After the trial, the employee's attorney learned that, during deliberations, one of the jurors had announced that he

used to work for the railroad and had made comments about the railroad's business practices. *Id.* at 485.

The employee moved for a new trial on two grounds: first, that the juror had concealed his past employment during voir dire, and second, that the juror had introduced to the jury potentially prejudicial evidence about the railroad's business practices. 812 F.2d at 483. In support of his motion on both grounds, the employee sought to introduce the affidavits of three jurors testifying about the statements that the juror had made. *Ibid.*

The district court determined that the affidavits were excluded by Rule 606(b) and denied the employee's motion for a new trial, see 812 F.2d at 483, but the Ninth Circuit reversed, see *id.* at 484-486. As is most relevant here, the Ninth Circuit held that, insofar as the employee was seeking to use the affidavits to show that the challenged juror had been dishonest during voir dire, the affidavits were admissible under what is now Rule 606(b)(1)[2] because "[s]tatements which tend to show deceit during voir dire are not barred by that rule." *Id.* at 485.

In addition, the Ninth Circuit went on to hold that, insofar as the employee was seeking to use the affidavits to show that the juror had introduced to the jury potentially prejudicial evidence about the railroad's business practices, the affidavits were admissible under the exception, now contained in Rule 606(b)(2), for evidence that "extraneous prejudicial information was improperly

---

[2] At the time of *Hard* and the other cases discussed in this section, both the general rule and the exceptions to that rule were codified in Rule 606(b). Rule 606(b) was broken up into paragraphs (1) and (2) as part of the recent restyling of the Federal Rules of Evidence. See Fed. R. Evid. 606 advisory committee's note (2011).

brought to the jury's attention." 812 F.2d at 486. The court reasoned that, where a juror's past personal experiences "are related to the litigation," they "constitute extraneous evidence which may be used to impeach the jury's verdict." *Ibid.* The court remanded for an evidentiary hearing to determine whether the employee was entitled to a new trial. *Ibid.*

More recently, the Ninth Circuit has confirmed that it adheres to *Hard*'s interpretation of what is now Rule 606(b)(1). In *United States* v. *Henley*, 238 F.3d 1111 (2001), the Ninth Circuit considered the admissibility, in connection with a motion for a new trial, of juror testimony regarding allegedly racist statements made by one of the jurors. See *id.* at 1113. The court reasoned that, "[w]here, as here, a juror has been asked direct questions about racial bias during voir dire, and has sworn that racial bias would play no part in his deliberations, evidence of that juror's alleged racial bias is indisputably admissible for the purpose of determining whether the juror's responses were truthful." *Id.* at 1121. In so reasoning, the Ninth Circuit cited *Hard* for the proposition that "[s]tatements which tend to show deceit during voir dire are not barred by" what is now Rule 606(b)(1). *Ibid.* (quoting *Hard*, 812 F.2d at 485).[3] Because petitioner seeks to introduce Mr. Titus's affidavit for the purpose of showing the foreperson's dishonesty during voir dire, that affidavit would plainly have been admissible under the Ninth Circuit's interpretation of Rule 606(b).

---

[3] The Ninth Circuit remanded for a factual determination as to whether the juror had in fact made the racist statements attributed to him—and, if so, whether that fact was sufficient to establish that he had been dishonest during voir dire. See *Henley*, 238 F.3d at 1122.

b. The District of Columbia Circuit has also held that Rule 606(b) permits a juror to testify about statements made during deliberations that tend to show juror dishonesty during voir dire, though it relied exclusively on the "extraneous prejudicial information" exception now contained in Rule 606(b)(2). In *United States* v. *Boney*, 68 F.3d 497 (D.C. Cir. 1995), defense counsel learned after a criminal trial that the jury foreperson had previously been convicted of a felony—a fact that, if disclosed, would have disqualified him from serving on the jury. *Id.* at 499. The defendant moved for a new trial. *Ibid.* At the hearing on the motion, the trial judge examined the foreperson, but refused to ask him any questions about his statements to the other jurors during deliberations, on the ground that such questions were barred by Rule 606(b). *Id.* at 500.

The D.C. Circuit agreed with the defendant that the questioning was permissible under the "extraneous prejudicial information" exception now contained in Rule 606(b)(2). 68 F.3d at 503. The court reasoned that, because the foreperson would not have been on the jury if he had disclosed his status as a convicted felon, "any discussion of [the foreperson's] felon status during deliberations would surely seem to be 'extraneous,' and possibly 'prejudicial' as well." *Ibid.* On that basis, the court "h[e]ld that Rule 606(b) does not prohibit further questioning of the [foreperson]." *Ibid.* Even assuming that Mr. Titus's affidavit would otherwise have been excluded under Rule 606(b)(1), therefore, the affidavit would have been admissible under the D.C. Circuit's interpretation of the "extraneous prejudicial information" exception in Rule 606(b)(2).

c. Beyond the holdings of the Ninth and D.C. Circuits, one other court of appeals has concluded in dicta that Rule 606(b) permits a juror to testify about state-

ments made during deliberations that tend to show juror dishonesty during voir dire. In *Maldonado* v. *Missouri Pacific Railway Co.*, 798 F.2d 764 (1986), cert. denied, 480 U.S. 932 (1987), the Fifth Circuit held that a district court had properly denied a defendant's post-verdict motion to obtain juror testimony concerning discussions the jury had allegedly had about the defendant's wealth. *Id.* at 769-770. In so holding, the Fifth Circuit noted that "the district court can receive testimony or grant a new trial only if the voluntary disclosure relates to 'extraneous prejudicial information' or 'outside influence' on the jury, *or false information (or withholding) given on voir[] dire.*" *Id.* at 770 (emphasis added). Because the defendant's motion "did not indicate that any juror believed he or she would be unable to treat [the defendant] fairly but concealed that fact during voir dire," the court concluded that the motion was seeking testimony that "clearly concerned matters shielded from inquiry by Rule 606(b)." *Ibid.* Notably, in *Hard*, the Ninth Circuit cited the foregoing language in support of the proposition that "[s]tatements which tend to show deceit during voir dire are not barred by [Rule 606(b)]," 812 F.2d at 485. And the Eighth Circuit cited the same language, but refused to follow it, in the opinion below. See App., *infra*, 8a.

2. a. By contrast, as the Eighth Circuit expressly recognized in joining it (App., *infra*, 9a), the Tenth Circuit has held, in the context of a motion for a new trial, that Rule 606(b) does not permit a juror to testify about statements made during deliberations that tend to show juror dishonesty during voir dire. In *Benally*, *supra*, the defendant, a Native American, was convicted of assaulting an officer with a dangerous weapon. 546 F.3d at 1231. After the trial, defense counsel learned that two of the jurors had made racist statements about Native

Americans during deliberations. *Ibid.* The defendant moved for a new trial on the ground that the jurors had lied about their impartiality during voir dire; the government argued that the supporting affidavits the defendant sought to introduce were inadmissible under Rule 606(b). *Id.* at 1232.

The district court determined that the affidavits were admissible and granted the motion for a new trial, see 546 F.3d at 1232, but the Tenth Circuit reversed, see *id.* at 1241-1242. At the outset, citing the Ninth Circuit's decisions, the Tenth Circuit noted that "[t]here is a split in the Circuits" on whether Rule 606(b) permits a party moving for a new trial to introduce juror testimony to prove juror dishonesty during voir dire. *Id.* at 1235 (citing *Hard*, 812 F.2d at 485, and *Henley*, 238 F.3d at 1121).

The Tenth Circuit ultimately rejected the Ninth Circuit's approach, however, and held that the affidavits were inadmissible under what is now Rule 606(b)(1). See 546 F.3d at 1236. The Tenth Circuit reasoned that, "[a]lthough the immediate purpose of introducing the testimony may have been to show that the two jurors failed to answer honestly during voir dire, the sole point of this showing was to support a motion to vacate the verdict, and for a new trial." *Id.* at 1235. According to the court, "[t]hat is a challenge to the validity of the verdict." *Ibid.* The court added that "allowing juror testimony through the backdoor of a voir dire challenge risks swallowing the rule." *Id.* at 1236. After determining that the affidavits did not qualify for admission under any of the enumerated exceptions now contained in Rule 606(b)(2), see *id.* at 1238, the Tenth Circuit rejected the defendant's arguments that it should create an implied exception for evidence of racial bias, see *id.* at 1238-1239, and that Rule 606(b) would be unconstitutional if applied to bar evidence of racial prejudice, see *id.* at 1239-1241.

The Tenth Circuit subsequently denied rehearing en banc, with three judges dissenting. Judge Briscoe, joined in part by Judge Lucero, challenged the panel's holding that the affidavits were inadmissible under what is now Rule 606(b)(1). See 560 F.3d at 1153-1154. She reasoned that, "contrary to being an inquiry into the validity of the verdict rendered by the jury in his case, [the defendant's] claim is more properly viewed as an inquiry into the legitimacy of [the] pre-trial procedures, and, in turn, the constitutionality of the overall proceedings." *Id.* at 1153 (second alteration in original; internal quotation marks and citation omitted). And she noted that the panel's interpretation of Rule 606(b) "conflicts with that of the Ninth and District of Columbia Circuits." *Ibid.* (citing *Henley*, 238 F.3d at 1121, and *Boney*, 68 F.3d at 503). Judge Briscoe also concluded that affidavits would have been admissible under the "extraneous prejudicial information" exception now contained in Rule 606(b)(2). See *id.* at 1154-1155.

Judge Murphy, joined by Judge Lucero, also dissented. See 560 F.3d at 1156. He agreed with Judge Briscoe that the affidavits would at a minimum have been admissible under the "extraneous prejudicial information" exception. See *ibid.* Although he "harbor[ed] some doubt" about whether the affidavits were admissible under what is now Rule 606(b)(1), he reasoned that "the issue is undoubtedly worthy of en banc review as the only other two circuits to directly address th[e] issue have reached a conclusion contrary to that adopted by the panel." *Ibid.*

b. In addition, as the Eighth Circuit noted (App., *infra*, 9a), one other court of appeals has concluded in dicta that Rule 606(b) does not permit a juror to testify about statements made during deliberations that tend to show juror dishonesty during voir dire. In *Williams*, *supra*, the Third Circuit considered a habeas petition in which a

prisoner contended that his right to an impartial trial was abridged because the state court refused to admit affidavits showing racial bias on the part of some jurors. See 343 F.3d at 225.

The Third Circuit ultimately vacated the district court's order denying the habeas petition and remanded for an evidentiary hearing. See 343 F.3d at 239. In the course of doing so, however, the Third Circuit considered and rejected the habeas petitioner's argument that the state court should have considered one of those affidavits because state law did not exclude evidence presented to support a claim of juror dishonesty during voir dire. See *id.* at 235-236. While noting that Rule 606(b) was inapplicable because the underlying proceeding had occurred in state court, the court concluded that Rule 606(b) "categorically bar[s] juror testimony 'as to any matter or statement occurring during the course of the jury's deliberations' even if the testimony is not offered to explore the jury's decision-making process in reaching the verdict." *Id.* at 235. Notably, the Third Circuit specifically rejected the Ninth Circuit's holding in *Hard* that Rule 606(b) does not bar "[s]tatements which tend to show deceit during voir dire." *Id.* at 235 n.5 (alteration in original). The Third Circuit asserted, without elaboration, that "it appears that the decision [in *Hard*] is inconsistent with [Rule] 606(b)." *Ibid.*

As matters stand, therefore, in the context of a motion for a new trial, juror testimony about statements made during deliberations that tend to show juror dishonesty during voir dire would be admissible in the Ninth and D.C. Circuits; inadmissible in the Eighth and Tenth Circuits; likely admissible in the Fifth Circuit; and likely inadmissible in the Third Circuit. That entrenched conflict warrants the Court's review.

B. The Question Presented Is An Important One That Warrants The Court's Review In This Case

1. The question presented in this case is a recurring one of substantial practical importance. As this Court has explained, a party is entitled to a new trial if it can "demonstrate that a juror failed to answer honestly a material question on *voir dire*, and then further show that a correct response would have provided a valid basis for a challenge for cause." *McDonough Power Equipment Inc.* v. *Greenwood*, 464 U.S. 548, 556 (1984). As a practical matter, juror dishonesty during voir dire will often come to light in much the same way that it did here: one juror will come forward with statements that another juror made during deliberations that tend to show that the challenged juror dishonestly answered questions in voir dire. Absent the unusual case in which the challenged juror admits to the deceit, the testimony of other jurors will often be the most probative evidence, if not the only evidence, of juror dishonesty.

If a party is unable to introduce the testimony of other jurors concerning the statements of the challenged juror—or even to examine the challenged juror about his own statements, see *Boney*, 68 F.3d at 500—the party will in many cases be disabled from bringing juror dishonesty to light and vindicating its right to a new trial. That is precisely what took place here, where Mr. Titus's affidavit was the sole evidence of the foreperson's dishonesty that petitioner was able to adduce. In cases like this one, resolution of the question whether Rule 606(b) permits such juror testimony will be dispositive of the underlying claim that juror dishonesty entitles the moving party to a new trial.

2. This case, moreover, is an ideal vehicle for consideration and resolution of the interpretive question concerning Rule 606(b). The Court has had only one recent

opportunity to consider that question, denying a petition for certiorari in *Benally*. This case, however, presents a vastly superior vehicle to *Benally*, for several reasons.

As an initial matter, to state the obvious, the Eighth Circuit's decision in this case deepens the conflict that already existed at the time of *Benally*. The Eighth Circuit expressly acknowledged that conflict, see App., *infra*, 8a-9a, before concluding that the Tenth Circuit's reasoning in *Benally* was "persuasive," see *id.* at 9a. To the extent, therefore, that there was any doubt at the time of *Benally* about the existence of a circuit conflict, but see *Benally*, 546 F.3d at 1235 (acknowledging that "[t]here is a split in the Circuits"), the Eighth Circuit's decision dispels it.

Perhaps more significantly, the petitioner in *Benally*, who was proceeding *in forma pauperis*, appears to have abandoned any argument before this Court that the affidavits at issue qualified for admission under the enumerated exceptions now contained in Rule 606(b)(2). See Br. in Opp. at 20, *Benally*, *supra* (No. 11-5090). Instead, the petitioner argued only that the Court should create an "implied exception to the limitations of Rule 606(b) based upon statements that show racial bias." Pet. at 19. That enabled the respondent in *Benally* to distinguish those circuit decisions that rest either in whole or in part on the enumerated exceptions in holding that juror testimony of the type at issue is admissible. See, *e.g.*, Br. in Opp. at 13-14 (citing *Hard*, 812 F.2d at 486); *id.* at 14 (citing *Boney*, 68 F.3d at 503). Here, by contrast, not only did the Eighth Circuit pass on both the admissibility of the affidavit under Rule 606(b)(1) and the applicability of the exceptions in Rule 606(b)(2) in the decision below, see App., *infra*, 6a-10a, but petitioner is relying on both provisions before this Court. Unlike *Benally*, therefore, this case fully implicates the circuit conflict, and it pre-

sents the Court with the full range of options as to how to resolve that conflict.

Finally, this case provides the Court with a cleaner vehicle in which to resolve the conflict over the correct interpretation of Rule 606(b), because it is free of the additional (and substantial) complication presented on the facts of *Benally*: namely, whether it would violate the Constitution to limit a criminal defendant's ability to present evidence that jurors were racially biased. The petitioner in *Benally* relied on that constitutional argument in support of his contention that the Court should create an implied exception in Rule 606(b) for evidence of racial bias, see Pet. at 17-24, *Benally*, *supra* (No. 11-5090), and lower courts have reached conflicting conclusions based on the constitutional implications of excluding such evidence. Compare *United States* v. *Villar*, 586 F.3d 76, 87 (1st Cir. 2009) (holding that the Constitution requires an exception "in those rare and grave cases where claims of racial or ethnic bias during jury deliberations implicate a defendant's right to due process and an impartial jury"), with *Benally*, 546 F.3d at 1241 (holding that the Constitution does not require "an implicit exception for racially biased statements made during jury deliberations").

This case, by contrast, involves a claim of juror dishonesty during voir dire that does not involve racial bias—and therefore cleanly and squarely presents the interpretive question whether Rule 606(b) permits a party moving for a new trial based on juror dishonesty during voir dire to introduce juror testimony about statements made during deliberations that tend to show the alleged dishonesty. Because there is undeniably a circuit conflict on the admissibility of such juror testimony, the Court should take this opportunity to resolve the conflict and grant review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

STEVEN C. BEARDSLEY
GARY D. JENSEN
BEARDSLEY, JENSEN & VON WALD, P.L.L.C.
4200 Beach Drive, Suite 8
P.O. Box 9579
Rapid City, SD 57709

KANNON K. SHANMUGAM
JAMES M. MCDONALD
ELI SAVIT
WILLIAMS & CONNOLLY LLP
725 Twelfth Street, N.W.
Washington, DC 20005
(202) 434-5000
kshanmugam@wc.com

OCTOBER 2013

APPENDIX

TABLE OF CONTENTS

Appendix A:	Court of appeals opinion, July 24, 2013	1a
Appendix B:	District court order, Mar. 28, 2012	12a
Appendix C:	Affidavit of Stacey Titus, Oct. 25, 2010	40a

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 12-1846

Gregory P. Warger, Plaintiff-Appellant

v.

Randy D. Shauers, Defendant-Appellee

Submitted: March 12, 2013
Filed: July 24, 2013

Before: WOLLMAN, BYE, and COLLOTON, Circuit Judges.

OPINION

BYE, Circuit Judge.

Gregory Warger sued Randy Shauers to recover for injuries he sustained during a traffic accident. After a mistrial, the jury returned a verdict for Shauers. Warger subsequently moved for judgment as a matter of law, or, in the alternative, for a new trial. The district court[1] denied his motion. On appeal, Warger contends the district court (1) erred by not granting a second mistrial after

---

[1] The Honorable Jeffrey L. Viken, United States District Judge for the District of South Dakota.

Shauers's counsel violated an in limine order, (2) should have granted him judgment as a matter of law because there was insufficient evidence to support the jury's verdict, and (3) improperly barred expert witnesses from opining on statutes governing the rules of the road. We affirm.

I

On August 4, 2006, Randy Shauers and Gregory Warger were involved in a traffic accident in Pennington County, South Dakota. Shauers's truck, which was pulling a camper trailer, clipped Warger's motorcycle. Warger suffered serious injuries, including the amputation of his left leg. He filed suit against Shauers, asserting a claim of negligence and seeking to recover for property damage, loss of enjoyment of life, permanent disability, present and future medical expenses, and prejudgment interest.

A jury trial commenced on July 20, 2010, resulting in a mistrial after Shauers's attorney violated the district court's in limine order instructing "that experts may offer opinion testimony as to a driver's conduct but may not offer legal opinions as to whether such conduct violates South Dakota law." Appellant's Add. 35. During a second trial, on cross-examination of an expert witness, Shauers's attorney again violated the order by asking whether "Mr. Warger ha[d] to yield to the right-of-way and not enter until he [was] certain that the highway [was] free of oncoming traffic " *Id.* at 38. Warger's counsel objected and asked for a recess. The court excused the jury and held a brief hearing, during which Warger moved for a mistrial. The court acknowledged the violation, but denied the motion for mistrial because it found the violation had not been prejudicial. After the recess, the court instructed the jury to disregard the

question. The trial continued without any further violations of the in limine order, and the jury returned a verdict in favor of defendant Shauers.

After the jury was released from further jury duty, one of the jurors contacted Warger's lawyer and expressed his concern as to the jury foreperson having behaved inappropriately during deliberations. Specifically, the juror alleged the foreperson had focused on her own daughter's past experience with a serious traffic accident, rather than the evidence presented at trial. In an affidavit, the juror contended that during deliberations the foreperson stated her daughter's life would have been ruined had her daughter been held liable for damages caused by the accident. The affidavit further alleged the foreperson expressed she was unwilling to return a verdict for Warger because the Shauers were a young couple and their lives would also be ruined should they be found liable. Further, it stated other jurors had been persuaded by her expressions of sympathy and thus decided to return a verdict for Shauers. Warger subsequently filed a motion for judgment as a matter of law, or, in the alternative, for a new trial. The district court refused to consider the juror's affidavit and denied the motion. Warger filed a timely appeal.

II

A. Violation of the In Limine Order

On appeal, Warger argues the district court should have declared a mistrial because the second violation of the in limine order was prejudicial. This Court will not disturb a trial court's denial of a motion for mistrial "absent a clear showing of abuse of discretion." *Pullman v. Land O'Lakes, Inc.*, 262 F.3d 759, 762 (8th Cir. 2001). "A violation of an order granting a motion in limine may on-

ly serve as a basis for a new trial when the order is specific in its prohibition and the violation is clear." *Black v. Shultz*, 530 F.3d 702, 706 (8th Cir. 2008). Such violation must constitute prejudicial error or result in an unfair trial. *Id.* "Prejudicial error is error which in all probability produced some effect on the jury's verdict and is harmful to the substantial rights of the party assigning it." *Id.* (quoting *Pullman*, 262 F.3d at 762).

It is undisputed the district court's in limine order was specific in its prohibition and the violation was clear. The issue raised on appeal is whether the violation was prejudicial. We agree with the district court, it was not. The court gave a curative instruction after the recess and, during final jury instructions, reminded the jury that if an objection is sustained they "must ignore the question and must not try to guess what the answer might have been." Appellant's App. 79. We have previously upheld district courts' refusals to grant mistrials for violations of in limine orders when, *inter alia*, the court gives "a prompt and clear curative instruction." *Russell v. Whirlpool Corp.*, 702 F.3d 450, 460 (8th Cir. 2012).

Warger argues the curative instruction was insufficient because it was not given until the jury had returned from the recess. Although it is true the instruction was not given until after the recess, Warger provides no persuasive explanation as to how Shauers's question affected the jury's verdict. He claims the question was prejudicial because it was an attempt to introduce inadmissible evidence which was key to Shauers's defense. However, the jury heard no inadmissible testimony because the district court sustained the objection and Shauers's counsel did not ask any similar questions during the re-

mainder of the trial. Accordingly, we cannot say the district court abused its discretion in denying a new trial.

B. Sufficiency of the Evidence

Warger next argues the district court erred when it denied his motion for judgment as a matter of law or for a new trial. First, he contends there was insufficient evidence to support the jury's verdict. Second, he argues the verdict was against the weight of the evidence because it was tainted by juror misconduct. "We review de novo the district court's denial of a motion for judgment as a matter of law, using the same standards as the district court." *Howard v. Mo. Bone & Joint Ctr., Inc.*, 615 F.3d 991, 995 (8th Cir. 2010). We will not grant such a motion unless no reasonable jury could have returned a verdict in favor of the non-moving party. Fed. R. Civ. P. 50(a). We will "grant judgment as a matter of law only when all of the evidence points one way and is susceptible of no reasonable inference sustaining the position of the nonmoving party." *Littleton v. McNeely*, 562 F.3d 880, 885 (8th Cir. 2009) (internal quotation marks and citation omitted). The standard for granting a new trial is even higher. *Howard*, 615 F.3d at 995. Such decision to grant a new trial lies within the discretion of the district court, Fed. R. Civ. P. 59, and we review the district court's decision for abuse of discretion. *Howard*, 615 F.3d at 995. "We will not reverse the district court's decision unless there is a clear showing that the outcome is against the great weight of the evidence so as to constitute a miscarriage of justice." *Bair v. Callahan*, 664 F.3d 1225, 1230 (8th Cir. 2012) (internal quotation marks omitted) (citing *Weitz Co. v. MH Washington*, 631 F.3d 510, 520 (8th Cir. 2011)).

First, we address Warger's contention as to the evidence presented at trial being insufficient to sustain the

verdict. Supporting such argument, Warger points to inconsistencies in Shauers's testimony and an expert witness's model recreating the accident. The district court devoted eight pages to addressing Warger's insufficiency argument. We find such detailed reasoning as being correct. The collision occurred in a matter of seconds, it was observed by few witnesses, and both parties presented conflicting expert testimony. Although Warger's verison of the accident may have been plausible, the jury also heard significant evidence in favor of Shauers. Reasonable jurors could have disagreed on which version was correct. Ultimately, in the face of conflicting evidence, the jury sided with Shauers; our court is not permitted to second-guess such collective judgment. The district court properly allowed the jury's verdict to stand.

We turn next to Warger's argument that the verdict was tainted by juror misconduct. Federal Rule of Evidence 606(b)(1) provides the general rule regarding inquiries into the validity of a verdict:

> During an inquiry into the validity of a verdict or indictment, a juror may not testify about any statement made or incident that occurred during the jury's deliberations; the effect of anything on that juror's or another juror's vote; or any juror's mental processes concerning the verdict or indictment. The court may not receive a juror's affidavit or evidence of a juror's statement on these matters.

Rule 606 also provides three exceptions to the general rule prohibiting the admissibility of such evidence. Warger argues the affidavit falls within the exception which allows a juror to testify about whether "extrane-

ous prejudicial information was improperly brought to the jury's attention." Fed. R. Evid. 606(b)(2)(A). We agree with the district court, it does not.

We have defined "extraneous information" to include "matters considered by the jury but not admitted into evidence." *United States v. Bassler*, 651 F.2d 600, 602 (8th Cir. 1981). Upon first blush, it would seem the foreperson's comments fall into this category. However, we have distinguished juror testimony regarding "objective events or incidents from juror testimony regarding possible subjective prejudices or improper motives of individual jurors, which numerous courts and commentators have held to be within the rule rather than the exception of 606(b)." *United States v. Krall*, 835 F.2d 711, 716 (8th Cir. 1987). Jurors' personal experiences do not constitute extraneous information; it is unavoidable they will bring such innate experiences into the jury room. Rather, extraneous information includes objective events such as "publicity and extra-record evidence reaching the jury room, and communication or contact between jurors and litigants, the court, or other third parties." *Id.* (citing *Gov't of the Virgin Islands v. Gereau*, 523 F.2d 140, 149 (3d Cir. 1975)). As we have previously instructed, "Rule 606(b) establishes very strict requirements for accepting testimony from jurors about their deliberations, and trial courts should be hesitant to accept such testimony without strict compliance with the rule." *Banghart v. Origoverken, A.B.*, 49 F.3d 1302, 1306 n.6 (8th Cir. 1995). In this case, the evidence excluded by the district court concerns an alleged bias held by a jury member. It does not concern extraneous information improperly brought before the jury. Thus, the exception to the rule does not apply, and we cannot say the district court abused its discretion.

In the alternative, Warger argues Rule 606(b) should not exclude the affidavit because it is not being used to challenge the verdict, but rather to show a juror was dishonest during voir dire. The Supreme Court has held, "to obtain a new trial in such a situation, a party must first demonstrate that a juror failed to answer honestly a material question on *voir dire*, and then further show that a correct response would have provided a valid basis for a challenge for cause." *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 554 (1984). Although juror testimony can be used to show dishonesty during voir dire for the purpose of contempt proceedings against the juror, *Clark v. United States*, 289 U.S. 1, 12–14 (1933), there is a split among the circuits as to whether such testimony may be used to challenge a verdict. *See United States v. Benally*, 546 F.3d 1230, 1235 (10th Cir. 2008).

The Ninth Circuit has held that statements by jurors regarding dishonesty during voir dire may be admitted into evidence for the purpose of challenging a verdict. *See United States v. Henley*, 238 F.3d 1111, 1121 (9th Cir. 2001) (holding "evidence of juror's alleged racial bias is indisputably admissible for the purposes of determining whether the juror's responses were truthful"); *Hard v. Burlington N. R.R.*, 812 F.2d 482, 485 (9th Cir. 1987) ("Statements which tend to show deceit during voir dire are not barred by [Rule 606(b)]."); *see also Maldonado v. Mo. Pac. R.R. Co.*, 798 F.2d 764, 770 (5th Cir. 1986) (stating in *dicta* that "the district court can receive testimony or grant a new trial if the [juror's] voluntary disclosure relates to false information (or withholding) given on voire [sic] dire").

The Third and Tenth Circuits have reasoned differently. Then-Judge Alito, writing for the Third Circuit, held trial courts may exclude such evidence:

> [T]he Federal Rules of Evidence categorically bar juror testimony 'as to any matter or statement occurring during the course of jury's deliberations' even if the testimony is not offered to explore the jury's decision-making process in reaching the verdict We hold that the exclusion of such testimony is not irrational and does not contravene or represent an unreasonable application of clearly established federal law.

Williams v. Price, 343 F.3d 223, 235–37 (3d Cir. 2003) (quoting Fed. R. Evid. 606(b)). More recently, the Tenth Circuit has sided with the Third Circuit's reasoning:

> [I]f the purpose of the post-verdict proceeding were to charge the jury foreman or the other juror with contempt of court, Rule 606(b) would not apply. However, it does not follow that juror testimony that shows a failure to answer honestly during voir dire can be used to overturn the verdict The Third Circuit's approach best comports with Rule 606(b), and we follow it here.

Benally, 546 F.3d at 1235–36 (citations omitted). We also find the Third Circuit's reasoning persuasive. "[A]llowing juror testimony through the backdoor of a voir dire challenge risks swallowing the rule. A broad question during voir dire could then justify the admission of any number of jury statements that would now be recharacterized as challenges to voir dire rather than challenges to the verdict." *Id.* at 1236.

Congress, when drafting Rule 606(b), made no exception for the admittance of such evidence. "[T]he legislative history demonstrates with uncommon clarity that Congress specifically understood, considered, and rejected a version of Rule 606(b) that would have allowed jurors to testify on juror conduct during deliberations " *Tanner v. United States*, 483 U.S. 107 (1987). We decline to create an exception to the rule here. In order to achieve finality in the litigation process and avoid relentless post-verdict scrutiny and second guessing, occasional inappropriate jury deliberations must be allowed to go unremedied. As the Supreme Court has warned, "full and frank discussion in the jury room, jurors' willingness to return an unpopular verdict, and the community's trust in a system that relies on the decisions of laypeople would all be undermined by a barrage of postverdict scrutiny of juror conduct." *Id.* at 120–21. Because we find Rule 606(b) precludes jurors from testifying in regards to jury deliberations for the purpose of challenging a verdict, we conclude the district court did not abuse its discretion.

C. Validity of the In Limine Order

Finally, Warger argues the district court erred by not allowing his accident reconstruction expert to testify whether either of the drivers' conduct violated South Dakota law. "We review a district court's decision concerning the admission of expert testimony for an abuse of discretion." *Miller v. Baker Implement Co.*, 439 F.3d 407, 412 (8th Cir. 2006) (citing *Peitzmeier v. Hennessy Indus., Inc.*, 97 F.3d 293, 296 (8th Cir. 1996)). The district court excluded such testimony because it would have been based on a traffic officer's report it had found inadmissible. Of course, expert testimony need not always be based on admissible facts or data. Fed. R. Evid.

703. However, expert testimony must be "the product of reliable principles and methods." Fed. R. Evid. 702(c). Because the district court found the officer's report not only inadmissible, but also unreliable, allowing such testimony would have contravened Rule 702(c). Although the court did not allow experts to testify regarding South Dakota law, it provided such information to the jury during final instructions. Thus, the jurors were informed on the rules of the road and were allowed to make their own decisions based on facts and testimony the court found reliable. The court's in limine order did not amount to an abuse of discretion.

III

For the foregoing reasons, the judgment of the district court is affirmed.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

No. 08-5092-JLV

Gregory P. Warger, Plaintiff

v.

Randy D. Shauers, Defendant

Decided March 28, 2012

VIKEN, District Judge.

ORDER DENYING PLAINTIFF'S MOTION FOR JUDGMENT AS A MATTER OF LAW OR NEW TRIAL

INTRODUCTION

Pending before the court is plaintiff's motion for judgment as a matter of law or, in the alternative, for a new trial. (Docket 170). Defendant resists the motion in its entirety. (Docket 180). For the reasons set forth below, the court denies plaintiff's motion.

FACTS AND PROCEDURAL HISTORY

The court limits its recitation to those facts necessary to resolve the pending motion. If needed, the court shall

provide additional facts in its discussion of the merits of the motion.

On August 4, 2006, plaintiff Gregory P. Warger and defendant Randy D. Shauers were involved in a motor vehicle collision on U.S. Highway 385 in Pennington County, South Dakota. (Docket 1 at ¶¶ 5–7). At the time of the collision, Mr. Warger was operating a motorcycle and Mr. Shauers was operating a three-quarter ton pickup pulling a 28–foot long camper trailer. *Id.* at ¶¶ 5–6. The collision resulted in serious injury to Mr. Warger, including but not limited to the loss of his lower left leg. *Id.* at ¶ 9. On December 12, 2008, Mr. Warger filed suit against Mr. Shauers, asserting a claim of negligence and seeking to recover for property damage, present and future lost wages, present and future pain and suffering, loss of enjoyment of life, permanent disability, present and future medical expenses, and prejudgment interest. *Id.* at pp. 2–3. Mr. Shauers denied the allegations and asserted various affirmative defenses, most prominent of which was contributory negligence.[1] Both parties asserted their right to a jury trial. (Dockets 1 at p. 4 & 6 at p. 3).

A jury trial commenced on July 20, 2010.[2] On July 22, 2010, the court declared a mistrial as a result of a violation of the court's *in limine* order by counsel for Mr.

---

[1] Mr. Shauers also asserted a counterclaim for property damage, which he voluntarily dismissed before the first trial. (Docket 98 at p. 1). Mr. Shauers also voluntarily abandoned the affirmative defenses of failure to mitigate and assumption of the risk. *Id.*

[2] During both trials, Mr. Warger appeared in person and by his counsel, Steven C. Beardsley and Travis B. Jones. Mr. Shauers appeared in person and by his counsel, Ronald Ray Kappelman and Gregory G. Strommen.

Shauers. (Docket 104). A second trial commenced on September 20, 2010. On September 29, 2010, the jury returned a verdict in favor of Mr. Shauers. (Docket 159). The same day, the Clerk of Court entered judgment in favor of Mr. Shauers and against Mr. Warger. (Docket 162). On October 25, 2010, Mr. Warger filed a motion for judgment as a matter of law pursuant to Fed. R. Civ. P. 50 or, in the alternative, for a new trial pursuant to Fed. R. Civ. P 59. (Docket 170; *see also* Dockets 171 & 182). Mr. Shauers resisted the motion. (Docket 180).

DISCUSSION

Mr. Warger raised three grounds in support of his motion: (1) the verdict was against the weight of the evidence; (2) the verdict was the product of the misconduct of Mr. Shauer's counsel; and (3) the verdict was the product of juror misconduct. (Docket 171). The court shall address each argument in turn.

A. Whether the Verdict was Against the Weight of the Evidence

When resolving a motion for judgment as a matter of law under Fed. R. Civ. P. 50, the court must determine whether there is sufficient evidence to support the jury's verdict.[3] *Anderson Marketing, Inc. v. Maple Chase Co.*, 241 F.3d 1063, 1065 (8th Cir. 2001). The court must view the evidence in a light most favorable to the prevailing

---

[3] The United States Court of Appeals for the Eighth Circuit reviews *de novo* the district court's decision to grant or deny a motion for judgment as a matter of law. *Howard v. Missouri Bone & Joint Center, Inc.*, 615 F.3d 991, 995 (8th Cir. 2010). In reviewing this type of motion, the Eighth Circuit uses the same standards as the district court. *Id.*

party and must give great deference to the jury's verdict. *Id.; Howard*, 615 F.3d at 995. Further, the court "must not engage in a weighing or evaluation of the evidence or consider questions of credibility." *Howard*, 615 F.3d at 995 (citation and internal quotation marks omitted); *see also White v. Pence*, 961 F.2d 776 (8th Cir. 1992) (same) (discussing in detail the difference between motions for judgment notwithstanding the verdict[4] and motions for new trial). The court will not reverse a jury's verdict unless it finds "no reasonable juror could have returned a verdict for the non-moving party." *Anderson Marketing, Inc.*, 241 F.3d at 1065 (citation and internal quotation marks omitted); *see also Structural Polymer Group, Ltd. v. Zoltek Corp.*, 543 F.3d 987, 991 (8th Cir. 2008) ("In reviewing the sufficiency of the evidence to support the jury's verdict, [the court] interpret[s] the record in a light most favorable to the prevailing party, affirming unless no reasonable juror could have reached the same conclusion."). "Judgment as a matter of law is appropriate only when all of the evidence points one way and is susceptible of no reasonable inference sustaining the position of the nonmoving party." *Howard*, 615 F.3d at 995 (citation and internal quotation marks omitted).

The standard for granting a new trial under Fed. R. Civ. P. 59 is even higher. *Id.* The "decision to grant a new trial lies within the sound discretion of the trial court."[5]

---

[4] A motion for judgment as a matter of law encompasses a motion for directed verdict and a motion for judgment notwithstanding the verdict. *Keenan v. Computer Associates International, Inc.*, 13 F.3d 1266, 1268, n. 2 (8th Cir. 1994). The court uses the same standards when reviewing such motions, regardless of their nomenclature. *Id.*

[5] The Eighth Circuit reviews the district court's decision to grant or deny a motion for a new trial under an abuse of discretion stand-

Id. The court should grant a new trial only to avoid a miscarriage of justice. *Id.; see also Structural Polymer Group, Ltd.*, 543 F.3d at 991 ("A new trial motion premised on a dispute about the strength of the supporting proof should be granted only if the verdict is against the weight of the evidence and allowing it to stand would result in a miscarriage of justice.") (citation and internal quotation marks omitted). Unlike a motion for judgment as a matter of law, in evaluating a motion for a new trial, the court "can rely on its own reading of the evidence—it can weigh the evidence, disbelieve witnesses, and grant a new trial even where there is substantial evidence to sustain the verdict." *White*, 961 F.2d at 780 (citation and internal quotation marks omitted).

Armed with an understanding of the standards governing motions for judgment as a matter of law and motions for a new trial, the court now turns to the merits of Mr. Warger's claim.

The jury returned a verdict in favor of Mr. Shauers. (Docket 159). In order to do so, as instructed by the court in its final jury instructions, the jury had to have found Mr. Shauers was not negligent, or his negligence was not a legal cause of Mr. Warger's injuries, or both parties were negligent, but Mr. Warger's negligence was more than slight in comparison to Mr. Shauers. *See* Docket 160 at pp. 30–31 (pp. 29–30 of the instructions). The court also instructed the jury (1) Mr. Warger had

---

ard. *Howard*, 615 F.3d at 995; *Structural Polymer Group*, Ltd., 543 F.3d at 991. "Where the basis of the motion for a new trial is that the jury's verdict is against the weight of the evidence, the district court's denial of the motion is virtually unassailable on appeal." *Howard*, 615 F.3d at 995 (citations and internal quotation marks omitted).

the burden to prove by the greater convincing force of the evidence Mr. Shauers was negligent, his negligence was the legal cause of Mr. Warger's injuries, and the amount of damages, if any, legally caused by Mr. Shauers' negligence and (2) Mr. Shauers had the burden to prove by the greater convincing force of the evidence Mr. Warger was contributorily negligent. (Docket 160 at p. 10; p. 9 of the instructions). In light of these governing principles, the court finds there was sufficient evidence for a reasonable jury to return a verdict in favor of Mr. Shauers and to find by the greater convincing force of the evidence Mr. Shauers was not negligent or, if he was negligent, Mr. Warger was contributorily negligent more than slight. *See Anderson Marketing, Inc.*, 241 F.3d at 1065 (The court will not reverse a jury's verdict unless it finds "no reasonable juror could have returned a verdict for the non-moving party.") (citation and internal quotation marks omitted).

In support of its finding, the court looks to the evidence admitted at trial. The evidence on the issue of liability consisted of exhibits and the testimony of lay witnesses Clint Elmore, Lieutenant David Berkley, Mr. Shauers, and Michelle (Misty) Shauers and expert witnesses Brad Booth and Dr. Jubal Hamernik.[6] (Docket 163). The court shall provide a brief summary of each witness's testimony.

Mr. Elmore testified he was traveling northbound on Highway 385 on his motorcycle when he saw Mr. Warger

---

[6] Mr. Warger testified only with respect to damages. Given the impact of the collision and the injuries he sustained, Mr. Warger could not remember any of the events immediately preceding or following the collision.

stop at the stop sign on the north fork of the Y intersection between Sheridan Lake Road and Highway 385, enter Highway 385 and travel south for a short distance, turn his left blinker on, and set up to stop in order to return to Sheridan Lake Road by virtue of a left turn onto the south fork of the Y intersection. Mr. Elmore testified he observed Mr. Warger's vehicle travel southbound on Highway 385 at a fast rate of speed. Mr. Elmore testified he noticed Mr. Shauer's was looking to the right and was concerned Mr. Shauers would not be able to stop in time. Mr. Elmore observed the collision in his rear-view mirror and returned to assist. Mr. Elmore provided a statement to Lieutenant Berkley at the scene of the collision. Mr. Elmore believed Mr. Warger had sufficient time to safely enter Highway 385.

Mr. Kappelman vigorously cross-examined Mr. Elmore. On cross-examination, Mr. Kappelman impeached Mr. Elmore's ability to see the events surrounding the collision and his memory of the events. Mr. Elmore testified the events surrounding the collision occurred during a matter of seconds, at a 90 mile per hour closing speed from his perspective, during busy traffic, and while he was paying attention to his own driving. Mr. Kappleman questioned Mr. Elmore regarding the written statement he provided to Lieutenant Berkley at the scene of the accident. Mr. Elmore admitted he did not include in his written statement most of the details about which he testified. He did not indicate in his written report that Mr. Warger stopped at the north fork of the Y intersection before turning onto Highway 385, that Mr. Warger put his blinker on as soon as he turned onto Highway 385, that Mr. Shauers was traveling too fast, would not be able to stop in time, and was looking to the right. Mr. Elmore provided statements a week after the collision and then three months after the collision and

did not indicate Mr. Shauers was looking to the right. Mr. Elmore first stated Mr. Shauers was looking to the right during Mr. Elmore's deposition approximately three years after the collision.

Lieutenant Berkley of the South Dakota Highway Patrol testified regarding his observations at the scene of the collision and the steps he took to collect evidence. Lieutenant Berkley arrived at the scene approximately twenty minutes after the collision. He observed a motorcycle lying in the ditch along the southbound lane of Highway 385 and observed skid marks from Mr. Shauers' vehicle starting from the southbound lane through the northbound lane toward the area where the motorcycle rested. He also observed the skid marks caused by the path of travel of Mr. Warger's motorcycle. The skid marks began near the center line of the highway. Lieutenant Berkley photographed all the skid marks. He was aware Mr. Shauers' trailer sustained damages to its right corner.

Mrs. Shauers testified in both parties' cases-in-chief. Mrs. Shauers testified regarding the checklist she and Mr. Shauers perform on their truck and camper before taking any trip, including the trip to South Dakota. Mr. Shauers drove approximately 15,000 miles before the collision. Mrs. Shauers testified Mr. Shauers was a very safe driver who pays attention to the roadway and is always aware of other vehicles. When Mrs. Shauers asked Mr. Shauers to look at a feature along the road, Mr. Shauers refused because he needed to pay attention to the roadway. Mrs. Shauers has rules for her children to follow when in the vehicle. She does not allow raised voices, sudden movements, or screams and does not allow the children to move around inside the vehicle. Mrs. Shauers testified Mr. Shauers was driving between 45 to

50 miles per hour before braking to avoid Mr. Warger. Mrs. Shauers testified regarding the other traffic on the roadway, including a truck with a slide-in camper traveling in front of them.

Mrs. Shauers testified she noticed traffic increased as they approached the intersection of Sheridan Lake Road and Highway 385. She turned around to check on her children for a few minutes and felt Mr. Shauers apply the brakes and subtly steer toward the center line of the highway. Mrs. Shauers looked forward and saw a motorcycle go from the right side of their lane to the center of the lane, then stop, and the motorcycle rider turned around and looked at her and raised his arm as if recognizing he made a traffic error. She did not see Mr. Warger at the Y intersection or enter the highway. She testified Mr. Shauers swerved to the center line and straddled the center line when he struck Mr. Warger. Mrs. Shauers did not know from which fork of Sheridan Lake Road Mr. Warger entered Highway 385. Right after the collision, Mr. Shauers told her Mr. Warger pulled out in front of them. In Mrs. Shauers' opinion, Mr. Shauers did not have adequate time and distance to avoid hitting Mr. Warger.

Mr. Jones cross-examined Mrs. Shauers and impeached her with prior inconsistent statements provided during her deposition. Mr. Jones pointed out inconsistencies in her testimony regarding other traffic, Mr. Shauers' speed at the time of impact, and the location of Mr. Warger when she first observed him.

Mr. Shauers testified in both parties' cases-in-chief. Mr. Shauers testified in great detail regarding his driving experience and training and his experience teaching his co-workers safe driving techniques. He testified regarding the safety inspection he made of his vehicle eve-

ry time before traveling on the road. He testified regarding his memory of the events surrounding the collision. He testified traffic was heavy in both lanes, with a high amount of motorcycle travel. He testified he was traveling southbound on Highway 385. When Mr. Shauers crested the hill approaching the Y intersection, he was traveling around 50 miles per hour. The speed limit in that area was 55 miles per hour. Approximately halfway down the hill, the road was at about a 5 percent grade. Given the configuration of the roadway, he could not see the intersection until he was about halfway down the hill. Mr. Shauers testified there was a vehicle with a slide-in camper traveling directly in front of him—slightly more than four to six seconds ahead of Mr. Shauers. Mr. Shauers testified he was not distracted in any way and was paying attention to and focused on his driving and the roadway.

Mr. Shauers did not begin to apply his brakes until he saw Mr. Warger. He was approximately 100 feet away or three to five seconds away from Mr. Warger when he first saw him. Mr. Shauers testified he did not see Mr. Warger until he entered the highway, that is, until Mr. Warger was in the northbound lane of the highway. He did not see Mr. Warger stopped at the intersection, but he assumed Mr. Warger ran the stop sign. Mr. Shauers testified he saw Mr. Warger travel onto Highway 385 perpendicular from the south fork of Sheridan Lake Road oriented toward the southbound lane of Highway 385. Mr. Shauers testified Mr. Warger pulled out in front of him, then turned to the left, almost reaching the right shoulder, and curved back to the right oriented south. Mr. Shauers testified Mr. Warger applied his brakes. As Mr. Warger crossed the center line and entered the southbound lane of the highway, Mr. Shauers testified he braked hard and moved to the left toward the oncoming

lane. Mr. Shauers did not press his horn to warn Mr. Warger of his approach. Mr. Shauers straddled the center line because there was another vehicle coming from the opposite direction. Mr. Shauers collided with Mr. Warger. Mr. Shauers came to a stop, exited the vehicle, asked Mrs. Shauers to move the truck and trailer out of the road, and ran to Mr. Warger to assist.

Mr. Beardsley vigorously questioned Mr. Shauers on direct examination as an adverse witness and on cross-examination. Mr. Bearsley impeached Mr. Warger with his prior inconsistent statements regarding, but not limited to, the location of Mr. Warger when Mr. Shauers first saw him, the path of travel of Mr. Warger, Mr. Shauers' attentiveness to the road, the presence of other vehicles on the roadway, and Mr. Shauers' statements Mr. Warger ran the stop sign and/or failed to yield.

Mr. Booth, an accident reconstructionist, gave extensive testimony in this case, subject to lengthy cross-examination. Mr. Booth testified as to his qualifications, education, and training. He explained how he conducted his analysis and interpreted the evidence, the measurements he took and calculations he reached, and how he created various diagrams. To summarize, in Mr. Booth's opinion, the evidence did not support Mr. Shauers' version of events, but rather was consistent with Mr. Elmore's version of events. Mr. Booth testified Mr. Shauers had sufficient time and distance to break, come to a stop, and stay in his lane without colliding with Mr. Warger.

Dr. Hamernik, an engineer who specializes in forensic engineering and accident reconsutruction, also provided extensive testimony in this case, again subject to lengthy cross-examination. Dr. Hamernik testified as to his qualifications, education, and training. He testified as

to the materials he reviewed to form his opinions and his methodology, which was different from the methodology used by Mr. Booth. Dr. Hamernik testified, regardless from which fork Mr. Warger entered the highway, by the time any driver in Mr. Shauers' position could have seen Mr. Warger and recognized the hazard, he would not have had sufficient time and distance to stop before impact. Dr. Hamernik opined the only course open to Mr. Shauers was to attempt to swerve and Mr. Warger created an emergency situation for Mr. Shauers. Dr. Hamernik opined, even if Mr. Elmore's version of events was correct, Mr. Warger did not have sufficient time and distance to safely enter the highway, travel a short distance south, stop, and then attempt to turn back onto Sheridan Lake Road.

Like many civil trials, the evidence included conflicting lay witness testimony and the battle of the experts. The court is cognizant of the standards governing a motion for judgment as a matter of law. The court must not reweigh the evidence or assess the credibility of the witnesses. *Howard*, 615 F.3d at 995. Significantly, the court must view the evidence in a light most favorable to Mr. Shauers as the prevailing party and must give great deference to the jury's verdict. *Anderson Marketing, Inc*, 241 F.3d at 1065. In light of these standards, the court rejects Mr. Warger's challenge to the sufficiency of the evidence and finds the evidence presented at trial was sufficient to sustain a finding Mr. Shauers was not negligent or, if he was negligent, Mr. Warger was contributorily negligent more than slight. The jury's verdict must stand.

Similarly, the court finds Mr. Warger cannot meet the even higher standard to justify a new trial. In reaching this decision, the court weighed the evidence and as-

sessed the credibility of the witnesses. *See White*, 961 F.2d at 780. The court finds the conflicting testimony was not the result of intentional falsehoods on the part of any witness. The collision occurred in a matter of seconds in an area of high traffic. Witnesses' perceptions of the incident naturally may differ and may change through time. The court finds the jury's verdict accurately reflects the weight of the evidence and the burdens of proof. The court does not find a miscarriage of justice occurred in this case. *See Howard*, 615 F.3d at 995.

B. Whether the Verdict was the Product of Counsel's Conduct

During the July 16, 2010, pretrial conference before the first trial, the court ruled expert witnesses could offer opinion testimony as to a driver's conduct, but could not offer legal opinions as to whether such conduct violated the laws and rules of the road of South Dakota. (Docket 98 at p. 1). During the second trial, in a hearing outside the presence of the jury toward the end of the direct examination of Mr. Booth on September 22, 2010, the court reiterated Mr. Booth could not offer an opinion as to whether any driver violated the rules of the road by failing to yield or failing to pay attention to his driving. Counsel for both parties indicated they understood the court's ruling. However, during cross-examination of Mr. Booth later that same day, Mr. Kappelman asked Mr. Booth the following question: "Mr. Warger has to yield the right-of-way and not enter Highway 385 until he's certain that the highway is free of oncoming traffic, isn't that correct?" (Exhibit A at p. 2, lines 4–6).

Before Mr. Booth answered the question, Mr. Jones objected. The court held a hearing outside the presence of the jury. During the hearing, Mr. Jones argued Mr.

Kappelman's question was in direct violation of the court's *in limine* order and moved for a mistrial on behalf of Mr. Warger. The court found Mr. Kappelman's question to be improper. The court warned Mr. Kappelman it was "not going to mistry this case again if [the court] can help it, but [the court] will mistry [the case] if [counsel] either intentionally or recklessly ask questions and put matters before this jury that I have excluded." *Id.* at p. 6, lines 1–4. In response to the court's directive, plaintiff's counsel did not renew the motion for mistrial, but rather stated he would ask for a directed verdict if another violation occurred. When the jury returned to the courtroom and the trial resumed, the court sustained Mr. Jones' objection and directed the jury to disregard the question.

Mr. Warger argues Mr. Kappelman's question prejudiced his case to such a degree as to require a new trial. (Docket 171 at pp. 8–10). Mr. Warger argues such prejudice "is obvious" from the jury's verdict. *Id.* at p. 9. Mr. Warger also alleges Mr. Kappelman compounded the prejudice by suggesting in his closing argument Mr. Warger had a duty to yield to traffic on Highway 385. *Id.* The court finds Mr. Warger's position unpersuasive.

When addressing a motion for new trial premised on an alleged violation of a district court's *in limine* order, the Eighth Circuit established the following guiding principles:

> In order for a violation of an order granting an in limine motion to serve as a basis for a new trial, the order must be specific in its prohibition and the violation must be clear. Further, a new trial may follow only where the violation has prejudiced the parties or denied them a fair trial. Prejudicial

> error is error which in all probability produced some effect on the jury's verdict and is harmful to the substantial rights of the party assigning it.

Pullman v. Land O'Lakes, Inc., 262 F.3d 759, 762 (8th Cir. 2001) (internal citations omitted).

The court finds its *in limine* order was specific in its prohibition. The court further finds Mr. Kappelman clearly violated the court's directive by asking Mr. Booth to provide a legal opinion as to the rules of the road. However, the court does not find Mr. Kappelman's question prejudiced Mr. Warger in any meaningful way or denied him a fair trial. First, Mr. Booth never answered Mr. Kappelman's question. If he had, the prejudicial impact of an answer given by an expert witness may well be high. Second, the court sustained Mr. Jones' objection and immediately instructed the jury to disregard the question. *See Black v. Shultz*, 530 F.3d 702, 707 (8th Cir. 2008) (finding district court did not abuse its discretion in denying defendants' motion for a new trial due to a violation of an *in limine* order when the district court, in part, instructed the jury the testimony was irrelevant and should be disregarded and the defendants did not suffer prejudice as a result of the violation); *Couch v. ConAgra Foods, Inc.*, 64 Fed. Appx. 595, 596 (8th Cir. 2003) (affirming district court's decision to deny defendant's motion for a new trial in large part because "the court's curative instructions to the jury removed any potential prejudice or error from violation of the oral order in limine"). Importantly, in both its preliminary and final jury instructions, the court instructed the jury that statements, arguments, questions, and comments by counsel were not evidence; the jury must ignore a question to which the court sustained an objection and must

not "try to guess what the answer might have been;" and testimony the court told the jury to disregard must not be considered. (Dockets 149 & 160). The court repeatedly instructed the jury they must decide the case based solely on evidence admitted during trial. *See id.*

Finally, the court reviewed Mr. Kappelman's closing argument. Although he argued Mr. Warger failed to yield to Mr. Shauers, he did not claim Mr. Booth or any expert witness gave such a legal opinion. Mr. Kappelman certainly had the right to argue Mr. Warger was contributorily negligent by failing to yield. The court's *in limine* order did not preclude defense counsel from arguing their theory of defense in closing argument. *Cf. Vanskike v. ACF Industries, Inc.*, 665 F.2d 188, 209–10 (8th Cir. 1981) (finding district court abused its discretion in denying defendant's motion for a mistrial and remanding for a new trial when the evidence did not warrant the submission of punitive damages to the jury, but, in closing argument, plaintiff's counsel made an improper and inflammatory punitive damages argument, referenced a recent high-profile case where a jury awarded punitive damages, and invited the jury to punish defendant and deter others from like conduct, all of which prejudiced defendant by resulting in an excessive award). The court also notes it advised the jury closing arguments were not evidence.

The court finds Mr. Warger is not entitled to a new trial because the violation of the *in limine* order did not prejudice Mr. Warger or deny him a fair trial. The court's repeated instructions to the jury cured any prejudice caused by Mr. Kappelman's single, unanswered question.

C. Whether the Verdict was the Product of Juror Misconduct

Mr. Warger's final argument centers around the conduct of the jury. Mr. Warger alleges juror misconduct occurred in the following two ways: (1) the jury foreperson deliberately lied during voir dire about her impartiality and ability to award damages if Mr. Warger satisfied his burden of proof on the issue of liability; and (2) the jury foreperson tainted jury deliberations by expressing untoward sympathy for Mr. Shauers and by swaying other jurors to do the same in violation of the court's jury instructions. (Docket 171 at pp. 10–13). In support of his allegations, Mr. Warger relies on an affidavit signed by Stacey Titus, a juror in this case, and dated October 25, 2010. (Docket 171–1). After the trial concluded, Mr. Titus contacted counsel for Mr. Warger and expressed his concerns regarding during jury deliberations. (Docket 170 at p. 10). Memorialized in his affidavit, Mr. Titus' concerns are as follows:

> The biggest concern I had during jury deliberations was the attitude and comments by some of the jurors to not consider the facts and evidence of the case. It was evident to me [Mr. Titus] that one juror, who ended up being the foreman, was influenced by her own daughter's experience, and not the facts, evidence, and law that was presented to us.
>
> The juror, who ended up being the foreperson, during deliberations spoke about her daughter's experience, which included a motor vehicle collision in which her daughter was at fault for the collision and a man died. She related that if her daughter

> had been sued, it would have ruined her life. She further indicated that her daughter sat down and visited with the family of the deceased person and gave them flowers at the 5 year anniversary of the collision.
>
> It is obvious that this juror was more concerned about the issues involving her daughter than she was the facts, evidence, and law presented by this Court and counsel. It was apparent that this comment may have been made to and influenced other jurors because other jurors also expressed their concern about ruining the Shauers' life as they were a young couple.
>
> . . . .
>
> I am still concerned regarding the bias expressed by this juror. I am concerned that the juror influenced other jurors by stating that her daughter's life would have been ruined if a lawsuit had been filed against her in her collision.

(Docket 171–1, ¶¶ 4–6, 8).

A court may grant a new trial if a party presents *admissible* evidence of juror bias. *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548, 554 (1984) (emphasis added). Fed. R. Evid. 606 limits the court's inquiry, however. Rule 606(a) establishes the general rule that a juror is not competent to testify as a witness on matters pertaining to the trial in which the juror sat. *See* Fed. R. Evid. 606(a). Rule 606(b) extends the general rule to inquiries into the validity of a verdict. *See* Fed. R. Evid. 606(b). This rule provides in pertinent part:

> Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith.

Fed. R. Evid. 606(b) (2011). The United States Supreme Court explained the rationale of Rule 606(b) as follows:

> There is little doubt that postverdict investigation into juror misconduct would in some instances lead to the invalidation of verdicts reached after irresponsible or improper juror behavior. It is not at all clear, however, that the jury system could survive such efforts to perfect it. Allegations of juror misconduct, incompetency, or inattentiveness, raised for the first time days, weeks, or months after the verdict, seriously disrupt the finality of the process. Moreover, full and frank discussion in the jury room, jurors' willingness to return an unpopular verdict, and the community's trust in a system that relies on the decisions of laypeople would all be undermined by a barrage of postverdict scrutiny of juror conduct.

Tanner v. United States, 483 U.S. 107, 120–21 (1987) (internal citations omitted).

There are three exceptions to the rule expressed in Rule 606(b), only two of which are relevant to this discussion. During an inquiry into the validity of a verdict, a juror may testify as to "whether extraneous prejudicial information was improperly brought to the jury's attention" or "whether any outside influence was improperly brought to bear on any juror." Fed. R. Evid. 609(b)(2) (2011). The court must determine whether Mr. Titus' statements are admissible as evidence of juror bias. The court finds the information provided by Mr. Titus does not fall in either exception to Rule 606(b) and, thus, cannot be considered.

The court finds instructive and persuasive the opinion of the district court in *Lopez v. Aramark Uniform & Career Apparel, Inc.*, an employment discrimination and sexual harassment case where the jury found in favor of plaintiffs. 417 F. Supp. 2d 1062 (N.D. Iowa 2006). After trial, defense counsel contacted the jurors. *Id.* at 1065. One of the jurors, Juror French, stated she felt there was undue pressure during jury deliberations because two other female jurors revealed during deliberations they were victims of sexual abuse. *Id.* Juror French stated 99 percent of why the verdict was so high was because of the two jurors' past sexual abuse. *Id.* The court examined whether this information was admissible so as to allow inquiry into "the subjective deliberative processes of a jury." *Id.* at 1072. The court found the information was not extraneous prejudicial information and, thus, did not fall within the exception to Rule 606(b). *Id.* The court reasoned as follows:

> Although the breadth of the exception is imprecise, it is clear that a juror may testify as to extra-record facts introduced into the jury room or the presence of an im-

> proper influence on the deliberations of the jury such as in the case of communications or contacts between jurors and litigants, the court, or other third parties. In contrast, juror testimony regarding the subjective prejudices or improper motives of individual jurors has been held to be encompassed by the rule, as opposed to, as the defendant contends, within the exception.
>
> It is a fact that jurors will bring with them to deliberations their life experiences. Indeed, how jurors perceive the evidence and judge the credibility thereof will be indubitably shaded by such experiences. When such information becomes part of the deliberative process, it becomes sacrosanct under Rule 606(b). The situation complained of by the defendant in this case is not a situation in which a juror conducted outside research or was contacted by a third party and then relayed the information to fellow jurors. This was simply a matter of two jurors drawing upon their prior life experiences and utilizing those experiences in the course of deliberations. Further inquiry, under Rule 606(b), is therefore, inappropriate.

Id. at 1072–73 (internal citations and quotation marks omitted).

The *Lopez* court cited with approval the decision of the United States Court of Appeals for the Fifth Circuit in *United States v. Duzac.* In *Duzac,* defendants learned

one or more jurors had certain prejudices because of prior personal experiences and moved for a new trial. 622 F.2d 911, 913 (5th Cir. 1980). The Fifth Circuit found Rule 606(b) prohibited inquiry into the verdict and no exception applied, reasoning as follows:

> Here, there is no evidence that any external influence was brought to bear on members of the jury. The prejudice complained of is alleged to be the product of personal experiences unrelated to this litigation. The proper time to discover such prejudices is when the jury is being selected and peremptory challenges are available to the attorneys. Although the jury is obligated to decide the case solely on the evidence, its verdict may not be disturbed if it is later learned that personal prejudices were not put aside during deliberations. We therefore hold that the trial court acted properly in denying appellant's motion for a new trial.

Id.

The district court in *Marcavage v. Bd. of Trustees of Temple Univ.* reached a similar conclusion. Following a verdict in favor of defendant, a juror contacted plaintiff's counsel and informed him of possible misconduct during jury deliberations. 400 F. Supp. 2d 801, 804 (E.D. Pa. 2005). The juror indicated several jurors expressed bias toward Christians. *Id.* The court found this information was not admissible because it did not fall within any exception to Rule 606(b). *Id.* at 805–06. The court found the information was not extraneous. "Extraneous influence has been found to include publicity received and discussed inside the jury room, consideration by the jury of

evidence not admitted in court, and communications or other contact between jurors and third persons, including contacts with the trial judge outside the presence of the [parties] and counsel." *Id.* at 805 (citing *Gov't of Virgin Islands v. Gereau*, 523 F.2d 140, 149 (3d Cir. 1975)). The court found the religious bias expressed by some jurors consisted of personal experiences with individuals of various religious faiths. "[L]ife experiences do not constitute extraneous prejudicial information and may be brought into the jury room." *Id.* (citing *Wilson v. Vermont Castings, Inc.*, 170 F.3d 391, 395 n. 4 (3d Cir. 1999)).

The court also found plaintiff failed to present any evidence an outside influence was improperly brought to bear on the jury. *Id.* at 806. "[T]he scope of 'outside influences' is limited and applies only to those influences outside the evidence presented at trial, such as prejudicial publicity, pressure placed on jurors from outside sources, [and] use of extrajudicial information." *Id.* (citing *Tanner*, 483 U.S. 107). "Additionally, evidence of discussions among the jury, intimidation or harassment of a juror by another, along with other intrajury influences fall within the prohibition of the rule not the exception and cannot be considered to impeach a verdict." *Id.* (citing *Gereau*, 523 F.3d at 149).

The court finds the opinions of the *Lopez*, *Duzac*, and *Marcavage* courts to be persuasive and representative of the majority view. The type of biases the foreperson allegedly expressed in this case, while unfortunate, do not fall within any exception to Rule 606(b). *See United States v. Benally*, 546 F.3d 1230, 1236–38 (10th Cir. 2008), *cert. denied*, 130 S. Ct. 738 (2009) (describing the type of information that falls within the enumerated exceptions to Rule 606(b) and collecting cases). Mr. Warger

cannot impeach the jury's verdict on the basis of this information.

Mr. Warger also seeks to use the affidavit of Mr. Titus to demonstrate the foreperson lied during voir dire. Concealed juror bias may justify a new trial in limited circumstances. See *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548, 556 (1984); *United States v. Tucker*, 137 F.3d 1016, 1026 (8th Cir. 1998). The issue is whether Mr. Warger may use information obtained during jury deliberations to challenge a juror's responses in voir dire.

The United States Court of Appeals for the Tenth Circuit recently addressed this precise issue in *Benally*, a criminal case involving a Native American defendant convicted of assaulting an officer with a dangerous weapon. 546 F.3d at 1231. After the jury announced its verdict, a juror approached defense counsel claiming the foreperson made racist claims against Native Americans and another juror agreed. *Id.* at 1231. The foreperson allegedly told the other jurors he used to live on or near an Indian reservation and "'[w]hen Indians get alcohol, they all get drunk,' and that when they get drunk, they get violent." *Id.* Other jurors allegedly discussed the need to "'send a message back to the reservation.'" *Id.* at 1232. One of the jurors allegedly stated two of his family members were in law enforcement and he "'heard stories from them about what happens when people mess with police officers and get away with it.'" *Id.* A defense investigator received corroborating information from another juror. *Id.* Armed with all of this information, defendant moved for a new trial on the basis certain jurors lied during voir dire and, during deliberations, improperly considered information not in evidence. *Id.* The district court admitted the juror testimony under the exceptions

to Rule 606(b) and found two jurors lied on voir dire and the jury improperly considered extrinsic evidence of stories by one of the juror's law enforcement family members. *Id.* The district court granted a new trial, and the government appealed. *Id.*

The Tenth Circuit found the district court erred in admitting the juror testimony about racial bias and about sending a message. *Id.* at 1241. The Tenth Circuit reversed the decision of the district court to grant a new trial and reinstated the jury verdict. *Id.* at 1241–42. In reaching its decision, the Tenth Circuit found the information fell within the ambit of Rule 606(b) because the jurors made the statements during the course of jury deliberations, regardless of the purpose for which defendant sought to use the information. *Id.* at 1235. Defendant argued he did not offer the testimony to inquire into the validity of the verdict, but rather to show certain jurors lied during voir dire. *Id.* The Tenth Circuit rejected this argument:

> Although the immediate purpose of introducing the testimony may have been to show that the two jurors failed to answer honestly during voir dire, the sole point of this showing was to support a motion to vacate the verdict, and for a new trial. That is a challenge to the validity of the verdict.
>
> It is true that juror testimony can be used to show dishonesty during voir dire, for purposes of contempt proceedings against the dishonest juror. Thus, if the purpose of the post-verdict proceeding were to charge the jury foreman or the other juror with contempt of court, Rule 606(b) would not apply. However, it does not follow that ju-

> ror testimony that shows a failure to answer honestly during voir dire can be used to overturn the verdict.
>
> . . .
>
> [Defendant] seeks to use Juror K.C.'s testimony to question the validity of the verdict. The fact that he does so by challenging the voir dire does not change that fact. We agree with the government that allowing juror testimony through the backdoor of a voir dire challenge risks swallowing the rule. A broad question during voir dire could then justify the admission of any number of jury statements that would now be re-characterized as challenges to voir dire rather than challenges to the verdict. Given the importance that Rule 606(b) places on protecting jury deliberations from judicial review, we cannot read it to justify as large a loophole as [defendant] requests.

Id. at 1235–36 (internal citations omitted); *see also Marcavage*, 400 F. Supp. 2d at 807 ("Although Plaintiff asks this Court to consider statements made during jury deliberations only as to whether a juror lied during *voir dire*, Plaintiff offers no Rule of evidence, nor court decision in support of his request that this Court make an exception as to the categorical prohibition against testimony on matters and statements occurring during jury deliberations. No case in any circuit has required a court to consider inadmissible evidence when inquiring as to whether a juror lied under *voir dire* "); *but see Hard v. Burlington Northern R.R.*, 812 F.2d 482, 485 (9th Cir. 1987) ("Statements which tend to show deceit during voir

dire are not barred by [Rule 606(b)," even if such statements were made during jury deliberations.]; *see also Williams v. Price*, 343 F.3d 223, 235 & 236 n. 6 (3d Cir. 2003) (Alito, J.) (finding *Hard* was inconsistent with Rule 606(b) and finding Rule 606(b)) "categorically bar[s] juror testimony 'as to any matter or statement occurring during the course of the jury's deliberations' even if the testimony is not offered to explore the jury's decision-making process in reaching a verdict," but rather is offered to support a claim of juror misconduct during voir dire). The Tenth Circuit in *Benally* went on to hold the juror statements did not fall within one of the enumerated exceptions to Rule 606(b), that is, the statements were not about extraneous prejudicial information or an outside influence, although they were "entirely improper and inappropriate." 546 F.3d at 1236–38.

The court finds the reasoning of the *Benally* and *Williams* courts persuasive. To allow statements made during jury deliberations to be used to challenge a juror's conduct during voir dire would undermine the purpose of Rule 606(b) and runs counter to its directive. Regardless of how Mr. Warger hopes to use the juror statements at issue, Rule 606(b) bars their admission unless the statements fall within one of the enumerated exceptions to Rule 606(b), which the court finds they do not. Accordingly, the court denies Mr. Warger's request for a new trial on the basis of alleged juror misconduct.

CONCLUSION

As discussed in this opinion, the court finds no legal cause to set aside the verdict and enter judgment as a matter of law for plaintiff or grant a new trial. Accordingly, it is hereby

ORDERED that Mr. Warger's motion for judgment as a matter of law or for a new trial (Docket 170) is denied.

APPENDIX C

STATE OF SOUTH DAKOTA
COUNTY OF PENNINGTON

AFFIDAVIT OF STACEY TITUS

Stacey Titus, being first duly sworn, deposes and states as follows:

1. My name is Stacey Titus. I am a Civil Engineer, employed by the City of Rapid City.

2. I served as a juror on the Greg Warger v. Randy Shauers trial.

3. Following the jury trial, which lasted approximately eight days, I was concerned about what had transpired in deliberations and stopped at the offices of Beardsley, Jensen & Von Wald, to visit with Steve Beardsley or Travis Jones.

4. The biggest concern I had during jury deliberations was the attitude and comments by some of the jurors to not consider the facts and evidence of the case. It was evident to me that one juror, who ended up being the foreman, was influenced by her own daughter's experience, and not the facts, evidence, and law that was presented to us.

5. The juror, who ended up being the foreperson, during deliberations spoke about her daughter's experience, which included a motor vehicle collision in which her daughter was at fault for the collision and a man died. She related that if her daughter had been sued, it would have ruined her life. She further indicated that her

daughter sat down and visited with the family of the deceased person and gave them flowers at the 5 year anniversary of the collision.

6. It is obvious that this juror was more concerned about the issues involving her daughter than she was the facts, evidence, and law presented by this Court and counsel. It was apparent that this comment may have been made to and influenced other jurors because the other jurors also expressed their concern about ruining the Shauers' life as they were a young couple.

7. Following the verdict I was concerned about the dilemma of the juror ignoring the dictates of the Court and the law. I sought advice from one of the City Attorneys regarding this matter and regarding whether I had an obligation to report to the Court the impropriety I observed.

8. I am still concerned regarding the bias expressed by this juror. I am concerned that the juror influenced other jurors by stating that her daughter's life would have been ruined if a lawsuit had been filed against her in her collision.

Further your affiant sayeth not.

Dated this 25 day of October, 2010.

/s/ Stacey P. Titus
Stacey Titus

Subscribed and sworn to before me this 25th day of October, 2010.

(SEAL) /s/ Travis B. Jones
Notary Public
My Commission expires: March 24, 2011

OPPOSITION BRIEF

No. 13-517

In the Supreme Court of the United States

GREGORY P. WARGER,

Petitioner,

v.

RANDY D. SHAUERS,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF IN OPPOSITION

RONALD R. KAPPELMAN
Counsel of Record
GREGORY G. STROMMEN
Banks, Johnson, Kappelman & Becker, PLLC
731 St. Joseph St., Second Floor
Rapid City, SD 57701
(605) 341-2400
rkappelman@rushmore.com

Counsel for Respondent

Becker Gallagher Cincinnati, OH · Washington, D.C. · 800.890.5001

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE PETITION 4

I. This case does not deepen the divide among the courts of appeal 4

II. Even if this Court grants certiorari, remand for an evidentiary hearing is unjustified because petitioner cannot meet his burden under *McDonough* and petitioner has furthermore waived his right to such a hearing 14

III. This case is not an optimal vehicle for consideration and resolution of the question presented 16

CONCLUSION 20

APPENDIX

Appendix A Motion for Judgment as a Matter of Law or New Trial in the United States District Court for the District of South Dakota, Western Division (October 25, 2010) App. 1

Appendix B Brief in Support of Motion for Judgment as a Matter of Law or New Trial in the United States District Court for the District of South Dakota, Western Division (October 25, 2010) App. 3

Appendix C Plaintiff's Reply to Defendant's Brief in Opposition to Plaintiff's Motion for Judgment as a Matter of Law or A New Trial in the United States District Court for the District of South Dakota, Western Division (November 26, 2010)) App. 19

Appendix D Excerpts of Transcript of Jury Trial, Voir Dire Examination in the United States District Court for the District of South Dakota, Western Division (September 20, 2010) App. 28

TABLE OF AUTHORITIES

Page

Cases:

Brown v. United States,
411 U.S. 223 (1972) 17

Hard v. Burlington Northern R.R.,
812 F.2d 482 (9th Cir. 1987) *passim*

Hard v. Burlington Northern R. Co.,
870 F.2d 1454 (9th Cir. 1989) 13

Maldonado v. Missouri Pacific Ry. Co.,
798 F.2d 764 (5th Cir. 1986) 6, 11, 12, 13

McDonough Power Equip., Inc. v. Greenwood,
464 U.S. 548 (1984) *passim*

Morgan v. Woessner,
997 F.2d 1244 (9th Cir. 1993) 13

Robinson v. Monsanto Co.,
758 F.2d 331 (8th Cir. 1985) 10, 15

Smith v. Phillips,
455 U.S. 209 (1982) 17

Tanner v. United States,
483 U.S. 107 (1987) 4, 20

Thiel v. S. Pac. Co.,
328 U.S. 217 (1946) 17

United States v. Angulo,
4 F.3d 843 (9th Cir. 1993) 15

United States v. Benally,
546 F.3d 1230 (10th Cir. 2008), reh'g denied, 560 F.3d 1151 (10th Cir. 2009), cert. denied, 558 U.S. 1051 (2009) *passim*

United States v. Boney,
68 F.3d 497 (D.C. Cir. 1995) 7, 8

U.S. v. Duzac,
622 F.2d 911 (5th Cir. 1980) 13

United States v. Henley,
238 F.3d 1111 (9th Cir. 2001) 6, 7, 11

United States v. Kerr,
778 F.2d 690 (11th Cir. 1985) 15

U.S. v. Krall,
835 F.2d 711 (8th Cir. 1987) 13, 19

United States v. Moses,
15 F.3d 774 (8th Cir. 1994) 16

United States v. Tucker,
137 F.3d 1016 (8th Cir. 1998) 16, 18

United States v. Wiley,
997 F.2d 378 (8th Cir. 1993) 16

United States v. Williams,
77 F.3d 1098 (8th Cir. 1996) 16

Warger v. Shauers,
721 F.3d 606 (8th Cir. 2013) 13

Williams v. Price,
343 F.3d 223 (3rd Cir. 2003) 3

Rules:

Fed. R. Evid. 606(b) *passim*

Fed. R. Evid. 606(b)(2) 3

Fed. R. Evid. 606(b)(2)(A) 4

STATEMENT OF THE CASE

This case arises out of a motor vehicle accident that occurred at the intersection of Sheridan Lake Road and Highway 385 in Pennington County, South Dakota on August 4, 2006. Pet. App. at 13a; Resp. C.A. Br. 2. Petitioner failed to yield to oncoming traffic and pulled in front of an oncoming pickup truck and 28-foot camper trailer driven by respondent. Despite respondent's attempts to avoid the accident, his vehicle clipped petitioner's motorcycle. Petitioner suffered serious injuries, including the loss of his left leg. Pet. App. at 13a; Resp. C.A. Br. 2, 5.

Petitioner subsequently filed suit against respondent, asserting a claim of negligence and seeking to recover for property damage, loss of enjoyment of life, permanent disability, present and future medical expenses, pain and suffering, and prejudgment interest. Pet. App. at 13a.

The case was tried twice before a jury. The first jury trial commenced on July 20, 2010, but ended on the fourth day of trial when the district court declared a mistrial for a violation of its *in limine* order. The second trial commenced on September 20, 2010. Pet. App. at 13a-14a.

During lengthy voir dire for the second trial, petitioner's counsel asked prospective jurors, as is relevant here, general, nonspecific questions such as: whether they had any problems with awarding damages for medical expenses, future medical expenses, and pain and suffering, as well as whether they could be a fair and impartial juror on this kind of case. Affirmative responses were given by all the

empaneled jurors as to questions on damages; none of the jurors voiced a response to the fair and impartial question. Resp. App. at 32-48.

The case proceeded to trial with a twelve person jury. On September 29, 2010, the jury returned a unanimous 12-0 verdict in favor of respondent.

After the jury was released from further jury duty, one of the jurors, Juror Titus, contacted petitioner's counsel and expressed his concern about what had been discussed during deliberations, specifically by Juror Whipple, the jury foreperson. Juror Titus signed an affidavit in which he alleged that during deliberations, Juror Whipple spoke about her experience with a serious automobile accident. Juror Whipple allegedly expressed to the jurors that her daughter had been at fault in a fatal automobile accident and had her daughter been sued for damages caused by the accident, her daughter's life would have been ruined. According to Juror Titus's affidavit, Juror Whipple's past experience, "and not the facts, evidence, and law that was presented" influenced her decision, as well as the other jurors' decision, to return a verdict for respondent. At no time did Juror Titus allege or accuse Juror Whipple of being dishonest during voir dire. Pet. App. 3a, 40a-41a.

Armed only with Juror Titus' affidavit,[1] petitioner moved for new trial based on several grounds,

---

[1] Petitioner did not produce affidavits from the other jurors that Juror Titus claimed were influenced by the alleged juror misconduct, nor did petitioner produce an affidavit from Juror Whipple. Resp. App. at 3-18.

including Juror Whipple's alleged misconduct.[2] The district court denied the motion, and as to the alleged juror misconduct, concluded that Federal Rule of Evidence 606(b) barred the admission of Juror Titus's affidavit. The district court, relying on *United States v. Benally,* 546 F.3d 1230 (10th Cir. 2008) reh'g denied, 560 F.3d 1151 (10th Cir. 2009), cert. denied, 558 U.S. 1051 (2009) and *Williams v. Price,* 343 F.3d 223 (3d Cir. 2003), explained "[t]o allow statements made during jury deliberations to be used to challenge a juror's conduct during voir dire would undermine the purpose of Rule 606(b) and runs counter to its direction." The district court also held that Juror Titus's affidavit was inadmissible under any of the exceptions in Rule 606(b)(2). Pet. App. 28a-38a.

The Eighth Circuit affirmed the district court's order denying a new trial. While acknowledging a split among the circuits as to whether testimony showing juror dishonesty may be used to challenge a verdict, the court of appeals found the reasoning of the Tenth and Third Circuits to be "persuasive." The court explained,

> Congress when drafting Rule 606(b), made no exception for the admittance of such evidence. 'The legislative history demonstrates with uncommon clarity that Congress specifically understood, considered, and rejected a version of

---

[2] Contrary to petitioner's contention (Pet. Br. 3, 5), the issue was framed as "juror misconduct" in petitioner's motion and brief for new trial. There were no allegations of dishonesty in petitioner's brief and reply brief in support of his motion. Instead, petitioner argued that Juror Whipple's statement constituted "extraneous prejudicial information." Resp. App. at 1, 12-15, 24-26.

> Rule 606(b) that would have allowed jurors to testify on juror conduct during deliberations '" (quoting *Tanner v. United States,* 484 U.S. 107 (1987). We decline to create an exception to the rule here. In order to achieve finality in the litigation process and avoid relentless post-verdict scrutiny and second guessing, occasional inappropriate jury deliberations must be allowed to go unremedied.

The court of appeals also agreed with the district court that Juror Titus's affidavit did not fall within the "extraneous information" exception of Rule 606(b)(2)(A), explaining that although Juror Whipple's comments "upon first blush" seem to fall within that category, "[j]uror's personal experiences do not constitute extraneous information; it is unavoidable they will bring such innate experiences into the jury room." Pet. App. at 6a-10a.[3]

REASONS FOR DENYING THE PETITION

I. This case does not deepen the divide among the courts of appeal.

Although there is a recognized split among the circuits, contrary to petitioner's contention (Pet. Br. 8-16) this case does not deepen the divide among the courts of appeal on the admissibility of juror testimony

---

[3] It must be noted that on appeal to the Eighth Circuit, petitioner did not allege juror misconduct as an issue. Pet. C.A. Br. ii. Instead, petitioner argued Juror Whipple's comments showed that the judgment was against the weight of the evidence. *Id.* at 31-33. Notably, petitioner conceded that Juror Titus's affidavit was not admissible to show juror misconduct. *Id.* at 33.

about statements made during deliberations that tend to show juror dishonesty during voir dire. None of the decisions cited by petitioner (Pet. Br. 9-16) supports the remarkable notion that juror testimony may be introduced to show juror dishonesty during voir dire when the alleged dishonest answers were to general, nonspecific questions during voir dire. Instead, unlike this case, each of the decisions relied upon by Petitioner (on both sides of the divide) involve specific, material questions and nonresponsive or dishonest answers by jurors.

For example, in *Hard v. Burlington Northern Railroad,* 812 F.2d 482 (9th Cir. 1987), Juror Fraser was asked several, specific and material questions during voir dire which were intended to reveal any prior contacts between the defendant and himself. *Id.* at 484. Juror Fraser was asked specifically if he had ever been employed by the defendant, had any kind of relationship with the defendant, or had any kind of dealing with the defendant. *Id.* at 484, n. 1. Juror Fraser "either failed to respond or answered in a manner which indicated that he had no significant prior contacts with [the defendant]." *Id.* at 484.

After the trial, however, three jurors came forward with affidavits stating that Juror Fraser made statements during deliberations regarding, among other things, his prior employment with the defendant or its predecessor, Northern Pacific Railroad. *Id.* at 483. The plaintiff moved for new trial alleging, as is most relevant here, juror dishonesty, and sought to introduce the juror affidavits in support of his motion. *Id.* The trial court refused to consider the affidavits,

finding that they were excluded by Rule 606(b), and denied the motion for new trial. *Id.*

On appeal, citing and relying on dicta from the Fifth Circuit's decision in *Maldonado v. Missouri Pacific Ry. Co.,* 798 F.2d 764, 770 (5th Cir. 1986) – which offers no rule of evidence or court decision in support of its conclusion that such testimony is admissible – the Ninth Circuit held that "statements which tend to show deceit during voir dire are not barred by [Rule 606(b)]." *Id.* at 485 (citing *Maldonado,* 798 F.2d at 770, for the proposition that "the district court can receive testimony or grant a new trial *only* if the voluntary disclosure relates to false information (or withholding) given on voire [sic] dire."). The case was thus remanded to hold a "hearing to investigate the allegation that Fraser failed to answer honestly a material question during voir dire." *Id.* (citing *McDonough Power Equip., Inc. v. Greenwood,* 464 U.S. 548, 556, 104 S.Ct. 845, 850, 78 L.Ed.2d 663 (1984)).

Likewise, in *United States v. Henley,* 238 F.3d 1111 (9th Cir. 2001), the jury was asked the following three specific race-related questions in a juror questionnaire: "what their overall views were of interracial dating, whether they had ever had a bad experience with a person of a different race, and whether race would influence their decisions in any way." *Id.* at 1114. Juror O'Reilly answered in the negative to all three questions. *Id.* at 1114, n. 5. However, after the trial it came to light that Juror O'Reilly allegedly made racist remarks while carpooling with other jurors to and from the trial but *before* deliberations had begun and *outside* the jury room. *Id.* at 1112-13. Quoting *Hard* for the proposition that "[s]tatements which tend to show

deceit during voir dire are not barred by Rule 606(b)", the Ninth Circuit reasoned:

> Where, as here, a juror has been asked *direct questions* about racial bias during voir dire, and has sworn that racial bias would play no part in his deliberations, evidence of that juror's alleged racial bias is indisputably admissible for the purpose of determining whether a juror's responses were truthful.

Id. at 1121 (citing *Hard,* 812 F.2d at 485) (emphasis added).

In *United States v. Boney,* 68 F.3d 497 (D.C. Cir. 1995), the jurors were also asked specific questions regarding whether they had ever been convicted of a state or federal crime. Juror J answered "no" on both the questionnaire and at voir dire. *Id.* at 498-99. After the trial it was revealed that Juror J was in fact a convicted felon. *Id.* at 499. The District of Columbia Circuit initially ordered that an evidentiary hearing be held to "determine whether [Juror J's] failure to disclose his felon status resulted in actual bias to the defendant." *Id.* At the evidentiary hearing on remand, the trial court conducted a limited examination about Juror J's potential bias but refused to inquire into what happened during jury deliberations, specifically whether his felon status or criminal history ever came up, on the grounds that such inquiry violated Rule 606(b). *Id.* at 500, 503. On appeal for the second time, the District of Columbia Circuit notably held that the "extraneous prejudicial information" exception of Rule 606(b) did not prohibit further questioning of Juror J because "*he had no right whatsoever to even serve on*

the jury." *Id.* at 503 (emphasis added). The District of Columbia Circuit reasoned:

> [I]t does not seem inappropriate to inquire of him whether his felon status ever came up during deliberations, and if so, the circumstances surrounding that disclosure. Although it is expected that jurors will bring their various life experiences into the jury room, [Juror J's] experience as a felon is the one matter that should not have been before the jury at all because no ex-felons should have been on the panel. Therefore, any discussion of [Juror J's] felon status during deliberations would surely seem to be 'extraneous' and possibly 'prejudicial' as well.

Id. at 503 (emphasis added). The court declined to address the issue of whether other jurors on the panel should have been questioned regarding their contacts with Juror J. *Id.*

Petitioner contends that like the Ninth Circuit, the District of Columbia Circuit in *Boney* also allowed jury testimony about statements made during deliberations to prove juror dishonesty during voir dire. Pet. Br. 12. However, it is clear that the District of Columbia Circuit reached its holding because the alleged dishonest juror "had no right whatsoever to even serve on the jury" because he was a convicted felon. *Id.* at 503. Therefore, *Boney* does not support petitioner's argument and should not be considered for the proposition that Juror Titus's affidavit would be admissible under the Rule 606(b) or its exception. Pet. Br. 12.

Although, specific and material questions were asked in *United States v. Benally,* 546 F.3d 1230, 1231 (10th Cir. 2008), the Tenth Circuit reached the opposite conclusion. In *Benally,* the jurors were questioned during voir dire about potential biases against Native Americans. *Id.* at 1231. Specifically, the jurors were asked: "would the fact that the defendant [was] a Native American affect your evaluation of the case; have you ever had a negative experience with any individuals of Native American descent; and if so, would that experience affect your evaluation of the facts of this case?" *Id.* After the trial, Juror K.C. approached defense counsel, claiming that two jurors had made racist remarks during deliberations. *Id.* The defendant subsequently moved for new trial on the grounds that jurors had lied during voir dire. *Id.* at 1232. The district court admitted juror testimony by affidavit under the exceptions in Rule 606(b) and granted a new trial. *Id.*

On appeal, the Tenth Circuit reviewed the history and purpose of Rule 606(b) and reversed, concluding that the affidavits were inadmissible under Rule 606(b). *Id.* at 1233-36. The Tenth Circuit explained:

> Although the immediate purpose of introducing the testimony may have been to show that the two jurors failed to answer honestly during voir dire, the sole point of this showing was to support a motion to vacate the verdict, and for a new trial. That is a challenge to the validity of the verdict.
>
> [A]llowing juror testimony through the backdoor of a voir dire challenge risks swallowing the

> rule. A broad question during voir dire could then justify the admission of any number of jury statements that would now be re-characterized as challenges to voir dire rather than challenges to the verdict. Given the importance that Rule 606(b) places on protecting jury deliberations from judicial review, we cannot read it to justify as large a loophole as [defendant] requests.

Id. at 1235-36.

However, despite the split between the Ninth and Tenth circuits, the facts of the instant case are entirely different than the cases cited above. Unlike the cases discussed above, petitioner has never alleged until now that Juror Whipple was dishonest – let alone that she failed to answer honestly a material question during voir dire. *See* Resp. App. at 1, 12-15, 24-26; Pet. C.A. Br. 31-33. Instead, the allegation has always been that Juror Whipple injected her personal experiences into the jury deliberations. *Id.*

In addition, unlike the specific questions asked in the cases above, the questions upon which petitioner bases his claim of juror dishonesty in this case were general, nonspecific, nonmaterial questions. At no time was Juror Whipple (nor the entire jury panel) asked, whether she or any of her close family members or friends had ever been involved in a serious motor vehicle accident where someone was severely injured or killed. Such a question would have been "reasonably calculated to require an affirmative response," *Hard,* 812 F.2d at 484, from Juror Whipple or "put her on notice that a particular answer was required." *Robinson v. Monsanto Co.,* 758 F.2d 331 (8th Cir. 1985). But petitioner's counsel never asked that

question. Instead, petitioner's counsel asked the jury as a whole, general, nonspecific questions about whether the jurors could be fair and impartial and whether they could award future medical expenses and/or pain and suffering if petitioner proved his case. Pet. Br. 4. Nothing in the record establishes that Juror Whipple deceived the court or counsel by answering affirmatively to these general questions or that her answers were untruthful. Petitioner's allegations of dishonesty are simply not true.

This case is, however, factually similar to *Maldonado v. Missouri Pacific Railway Co.*, 798 F.2d 764 (5th Cir. 1986), which is the case that the Ninth Circuit relied on in *Hard* and *Henley* in reaching the conclusion that "[s]tatements which tend to show deceit during voir dire are not barred by Rule 606(b)." *See Hard,* 812 F.2d at 485; *Henley,* 238 F.3d at 1121.

In *Maldonado,* the jurors were asked a nonspecific question during voir dire about their ability to treat the defendant (a corporation) like any other individual. 798 F.2d at 770. After the trial, Juror Valdez contacted defense counsel and disclosed that "the jury had substantial discussions concerning defendant's wealth and about giving the benefit of the doubt to the plaintiff." *Id.* at 769. The defendant subsequently requested leave of the court to obtain Juror Valdez's affidavit or testimony in support of its motion for new trial. *Id.* The district court denied the defendant leave and its motion for new trial. *Id.*

The Fifth Circuit affirmed, holding that the testimony sought by the defendant was shielded by Rule 606(b), as such testimony was sought to examine the jurors' subjective thoughts and feelings during

deliberations. *Id.* at 770. Acknowledging in dicta – without citing to a rule of evidence or court decision – that a court "can receive testimony or grant a new trial *only* if the voluntary disclosure relates to false information (or withholding) given on voire [sic] dire," the Fifth Circuit explained this was not such a case:

> [D]efendant's motion *did not indicate to the district court that any juror had concealed information during voir dire.* In the present case, Missouri Pacific sought to examine the jurors about their subjective thoughts during deliberations. *Its motion did not indicate that any juror believed he or she would be unable to treat Missouri Pacific fairly but concealed that fact during voir dire.* The testimony sought by Missouri Pacific clearly concerned matters shielded from inquiry by Rule 606(b).

Id. (emphasis added).

As in *Maldonado,* neither Petitioner's motion for new trial, briefs in support thereof, nor Juror Titus's affidavit indicate that Juror Whipple believed that she would be unable to treat petitioner fairly and concealed that fact during voir dire. Pet. App. at 40a-41a; Resp. App. at 1, 12-15, 24-26. Petitioner's motion for new trial framed the issue as juror misconduct. *Id.* There were no allegations of dishonesty. *Id.* Instead, the focus of petitioner's allegation was that Juror Whipple "injected her personal story into the deliberations" which prevented the jury from discussing the facts and law of the case. Resp. App. p. 15. Therefore, like the defendant in *Maldonado,* petitioner seeks to examine the jurors about their subjective thoughts during deliberations through Juror Titus's affidavit. The

circuits, including the Fifth, Eighth, Tenth, and even the Ninth, have uniformly agreed that such inquiry is shielded by Rule 606(b). *See Maldonado,* 798 F.2d at 770; *U.S. v. Duzac,* 622 F.2d 911, 913 (5th Cir. 1980) (holding "although the jury is obligated to decide the case solely on the evidence, its verdict may not be disturbed if it is later learned that personal prejudices were not put aside during deliberations"); *Warger v. Shauers,* 721 F.3d 606, 611 (8th Cir. 2013) (explaining juror personal experiences are within the protection of Rule 606(b); "it is unavoidable they will bring such innate experiences into the jury room.") (citing *U.S. v. Krall,* 835 F.2d 711, 716 (8th Cir. 1987) (same)); *Benally,* 546 F.3d at 1236; *Hard v. Burlington Northern R. Co.,* 870 F.2d 1454, 1461 (9th Cir. 1989) (*Hard II*) (explaining that "general knowledge, opinions, feelings, and bias that every juror carries into the jury room," are protected by Rule 606(b) and that "[i]t is expected that jurors will bring their life experiences to bear on the facts of the case"); *Morgan v. Woessner,* 997 F.2d 1244 (9th Cir. 1993) (holding subjective thoughts and beliefs are beyond the scope of inquiry for new trial under Rule 606(b)).[4]

Therefore, even with a split among the circuits, this case can be reconciled with the Ninth Circuit's decisions holding admissible, under Rule 606(b), juror testimony showing dishonesty during voir dire – warranting no further review by this Court.

---

[4] The jury was instructed in the instant case, without objection, that they had "a right to consider the common knowledge possessed by all of [them], together with the ordinary experiences and observations in [their] daily affairs of life." D. Ct. Dkt. 160; Tr. 155C, D. Ct. Dkt. 204 (Sept. 28, 29, 2010).

II. Even if this Court grants certiorari, remand for an evidentiary hearing is unjustified because petitioner cannot meet his burden under *McDonough* and petitioner has furthermore waived his right to such a hearing.

Even if this Court were to grant certiorari and agree with the Ninth Circuit that Juror Titus's affidavit is admissible under Rule 606(b), petitioner is not automatically entitled to a new trial. Petitioner must still make a showing under this Court's rule set forth in *McDonough*, that Juror Whipple "failed to answer honestly a material question on voir dire, and that a correct response would have provided a valid basis for a challenge for cause. *McDonough*, 464 U.S. at 556, 104 S.Ct. at 850. Petitioner cannot make that showing and has furthermore waived his right to an evidentiary hearing on the issue.

Until this petition for writ of certiorari, petitioner has never alleged that Juror Whipple was dishonest – let alone that she failed to answer honestly a material question on voir dire. *See* Resp. App. at 1, 12-15, 24-26; Pet. C.A. Br. 31-33. The only evidence petitioner has produced on the record, and upon which petitioner bases his claim, is an affidavit from one juror. However, this affidavit does not, on its face, remotely allege that Juror Whipple failed to answer honestly a material question on voir dire. Pet. App. 40a-41a. Instead, Juror Titus's affidavit merely alleges that Juror Whipple injected her personal experiences to the jury deliberations which prevented the other jurors from considering the evidence. *Id.*

But even assuming *arguendo* that Juror Titus's affidavit does allege dishonesty, the questions upon

which petitioner bases his claim that Juror Whipple answered dishonestly were general, nonspecific questions asked to the jury as a whole – none of which were material. The jury was never asked whether they or a close family member or friend had been in a serious motor vehicle accident. A failure to answer such a material question would undeniably be an intentional concealment of the truth by Juror Whipple. However, no such question was asked and "we cannot put upon the jury the duty to respond to questions not posed." *United States v. Kerr,* 778 F.2d 690, 694 (11th Cir. 1985). "Furthermore, the right to challenge a juror is waived by failure to object at the time the jury is empaneled if the basis for objection might have been discovered during voir dire." *Robinson*, 758 F.2d at 335. Petitioner simply cannot make a particularized showing that Juror Whipple failed to answer honestly a material question on voir dire.

Nor is petitioner entitled to an evidentiary hearing to establish that he is entitled to a new trial under *McDonough* because petitioner waived that right. Petitioner never requested an evidentiary hearing, nor did Petitioner ever allege the district court abused its discretion in failing to hold an evidentiary hearing. Therefore, this issue has not been preserved for appeal.

However, even assuming that this issue was preserved, the district court did not abuse its discretion in not conducting an evidentiary hearing to investigate whether Juror Whipple failed to honestly answer a material question during voir dire. "An evidentiary hearing is not mandated *every* time there is an allegation of jury misconduct or bias." *United States v. Angulo,* 4 F.3d 843, 847 (9th Cir. 1993). *See also*

United States v. Moses, 15 F.3d 774, 778 (8th Cir. 1994) ("Not every allegation requires an evidentiary hearing."). "The district court has broad discretion in handling allegations that jurors have not answered voir dire questions honestly, and we defer to its discretion in deciding whether a post-trial hearing is necessary." *United States v. Tucker*, 137 F.3d 1016, 1026 (citing *United States v. Williams*, 77 F.3d 1098, 1100 (8th Cir. 1996)); *see also United States v. Wiley*, 997 F.2d 378, 383 (8th Cir. 1993) (same); *McDonough*, 464 U.S. at 556, 104 S.Ct. at 850 (indicating that the decision to conduct a post-trial hearing remains within the "trial court's option").

In this case, the district court, in addition to its own observations from presiding over the trial, had before it petitioner's motion for new trial, briefs in support thereof, Juror Titus's affidavit, and the transcript of voir dire in determining whether to conduct an evidentiary hearing. On this record, which has been discussed in detail above, the district court concluded that petitioner failed to make a sufficient showing to entitle him to a hearing and findings of fact on this issue because there were simply no allegations of dishonesty asserted.

III. This case is not an optimal vehicle for consideration and resolution of the question presented.

While the question presented is one that may warrant the Court's review at some point, this case is not an optimal vehicle for consideration and resolution of the question. Pet. Br. 17-19. Contrary to Petitioners contention that this case presents the Court with a "cleaner vehicle" in which to resolve the conflict (Pet.

Br. 19), this case is rife with facts that could undermine the jury process itself and make motions and appeals on this basis commonplace.

"This Court has long held that 'a litigant is entitled to a fair trial but not a perfect one' for there are no perfect trials." *McDonough,* 464 U.S. at 552, 104 S.Ct. at 848 (quoting *Brown v. United States,* 411 U.S. 223, 231-232, 93 S.Ct. 1565, 1570-1571, 36 L.Ed.2d 208 (1972)) (additional citations and quotation marks omitted). "The American tradition of trial by jury, considered in connection with either criminal or civil proceedings, necessarily contemplates an impartial jury[,]" *Thiel v. S. Pac. Co.*, 328 U.S. 217, 220, 66 S. Ct. 984, 985, 90 L. Ed. 1181 (1946), "a jury capable and willing to decide the case solely on the evidence before it." *Smith v. Phillips,* 455 U.S. 209, 217, 102 S.Ct. 940, 946, 71 L.Ed.2d 78 (1982).

> *Voir dire* examination serves to protect that right by exposing possible biases, both known and unknown, on the part of potential jurors. Demonstrated bias in the responses to questions on *voir dire* may result in a juror being excused for cause; hints of bias not sufficient to warrant challenge for cause may assist parties in exercising their peremptory challenges. The necessity of truthful answers by prospective jurors if this process is to serve its purpose is obvious.

McDonough, at 554, 104 S.Ct. at 849. However, "jurors are not necessarily experts in English usage. Called as they are from all walks of life, many may be uncertain as to the meaning of terms which are relatively easily understood by lawyers and judges." *Id.* at 555, 104

S.Ct. at 849. And "[f]ailure to ask the questions necessary to expose bias at voir dire can result in waiver of objections to a juror." *United States v. Tucker*, 137 F.3d 1016, 1029 (8th Cir. 1998) (citations omitted).

In this case, the jury as a whole was asked general, nonspecific questions about their abilities to be fair and impartial and to award future medical expenses and/or pain and suffering if petitioner proved his case. Petitioner's counsel failed to ask any direct questions regarding whether they, their family members, or their close friends had ever been involved in a serious motor vehicle accident – let alone if they or a close family member or friend had been involved in an accident. If Petitioner was interested in this topic, he had an obligation to ask more probing questions during voir dire to ferret out this type of sensitive and specific information. We will never know the meaning Juror Whipple attributed to the phrase "fair and impartial" and it is wholly unreasonable to conclude that such general questions required the response petitioner now contends was due from Juror Whipple. It was petitioner's duty to ask the necessary questions to expose any bias the jurors may have had in this case – he failed to do so.

The American jury system is the best in the world. It "is grounded on the conviction, borne out by experience, that decisions by ordinary citizens are likely, over time and in the great majority of cases, to approximate justice more closely than more transparently law-bound decisions by professional jurists." *Benally*, 546 F.3d at 1233.

> Jury decision-making is designed to be a black box: the inputs (evidence and argument) are carefully regulated by law and the output (the verdict) is publicly announced, but the inner workings and deliberation of the jury are deliberately insulated from subsequent review. Judges instruct the jury as to the law, but have no way of knowing whether the jurors follow those instructions. Judges and lawyers speak to the jury about how to evaluate the evidence, but cannot tell how the jurors decide among conflicting testimony or facts. Juries are told to put aside their prejudices and preconceptions, but no one knows whether they do so. Juries provide no reasons, only verdicts.

Id. "The rule makes it difficult and in some cases impossible to ensure that jury verdicts are based on evidence and law rather than bias or caprice." *Id.* But "the proper time to discover this type of influence is when the jury is selected and peremptory challenges are available to the attorney." *Krall,* 835 F.2d at 716 (citations omitted).

To grant review of this case and address the question presented would endorse and permit post-trial inquiry in every case. Allowing such broad questions during voir dire to be used to allege juror dishonesty and attack the verdict would incorrectly burden jurors with the responsibility of being able to infer what information, no matter how remote, is relevant, as opposed to requiring counsel to solicit the information pertinent to the case. Jurors would no longer be protected from harassment by counsel seeking to nullify a verdict, free and frank jury discussions would

be chilled, and the "community's trust in the system that relies on the decisions of laypeople would all be undermined by a barrage of postverdict scrutiny." *Tanner v. United States*, 483 U.S. 107, 121, (1987).

Petitioner had every opportunity to ask the necessary questions that would have elicited the response he contends Juror Whipple withheld during voir dire. Petitioner failed to do so, making this not the "optimal vehicle" for this Court's review.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully Submitted,

Ronald R. Kappelman
Counsel of Record
Gregory G. Strommen
Banks, Johnson, Kappelman & Becker, PLLC
731 St. Joseph St., Second Floor
Rapid City, SD 57701
(605) 341-2400
rkappelman@rushmore.com

APPENDIX

APPENDIX

TABLE OF CONTENTS

Appendix A Motion for Judgment as a Matter of Law or New Trial in the United States District Court for the District of South Dakota, Western Division (October 25, 2010) App. 1

Appendix B Brief in Support of Motion for Judgment as a Matter of Law or New Trial in the United States District Court for the District of South Dakota, Western Division (October 25, 2010) App. 3

Appendix C Plaintiff's Reply to Defendant's Brief in Opposition to Plaintiff's Motion for Judgment as a Matter of Law or A New Trial in the United States District Court for the District of South Dakota, Western Division (November 26, 2010)) App. 19

Appendix D Excerpts of Transcript of Jury Trial, Voir Dire Examination in the United States District Court for the District of South Dakota, Western Division (September 20, 2010) App. 28

APPENDIX A

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

Civ No. 08-5092-JLV

[Filed October 25, 2010]

GREGORY P WARGER,
Plaintiff,
v.
RANDY D. SHAUERS,
Defendant.

MOTION FOR JUDGMENT AS A MATTER OF LAW OR NEW TRIAL

Plaintiff Gregory P. Warger, by and through his attorneys of record, respectfully submits his Motion for Judgment as a Matter of Law pursuant to Federal Rule of Civil Procedure 50 or, in the alternative, Motion for New Trial pursuant to Federal Rule of Civil Procedure 59. Warger moves the Court to set aside the verdict of the jury and enter judgment as a matter of law in favor of Warger in accordance with Warger's prior motion for judgment as a matter of law or if the foregoing motion be denied to set aside the verdict and the judgment entered thereon and grant Warger a new trial for the following reasons:

1. The verdict is against the weight of the evidence and not sustained by the sufficiency of the evidence.

2. The verdict was the product of misconduct on behalf of Defendant's counsel who violated the Court's Order on Motions in Limine.

3. The verdict was the product of juror misconduct.

WHEREFORE, Warger requests that this Court enter judgment in his favor, or, in the. alternative, that it set aside the jury verdict and order a new trial in this case.

Respectfully submitted this 25th day of October, 2010.

BEARDSLEY, JENSEN & VON WALD, Prof. L.L.C.

By: /s/ Travis B. Jones
Steven C. Beardsley
Travis B. Jones
4200 Beach Drive, Suite 3
P.O. Box 9579
Rapid City, SD 57709
Telephone: (605) 721-2800
Facsimile: (605) 721-2801
Email: sbeards@blackhillslaw.com
tjones@blackhillslaw.com

* * *

[Certificate of Service Omitted for Purposes of this Appendix]

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

Civ No. 08-5092-JLV

[Filed October 25, 2010]

GREGORY P WARGER,

Plaintiff,

v.

RANDY D. SHAUERS,

Defendant.

BRIEF IN SUPPORT OF PLAINTIFF'S MOTION FOR JUDGMENT AS A MATTER OF LAW OR NEW TRIAL

Plaintiff Gregory P Warger, by and through his attorneys of record, respectfully submits this Brief in Support of Plaintiff's Motion for Judgment as a Matter of Law or New Trial.

PRELIMINARY STATEMENT

Pursuant to Federal Rules of Civil Procedure 50 and 59 Plaintiff moves the Court to set aside the verdict of the jury and enter judgment as a matter of law in favor of Plaintiff in accordance with Plaintiffs prior motion for judgment as a matter of law or if the foregoing

motion be denied to set aside the verdict and the judgment entered thereon and grant Plaintiff a new trial.

Plaintiffs motion is based upon (1) the overwhelming weight of the evidence which does not support the verdict for Defendant; (2) Defendant's counsel's violation of the Court's Order regarding the admission of certain testimony which resulted in prejudice to the Plaintiff that could not be overcome, and (3) the verdict was the product of juror misconduct. As evidenced below the court should enter judgment in favor of the Plaintiff, or in the alternative set the verdict aside and grant Plaintiff a new trial.

ARGUMENT

1. The verdict is against the weight of the evidence and a new trial should be granted pursuant to Rule 59.

"In determining whether a verdict is against the weight of the evidence, the trial court can rely on its own reading of the evidence-it can 'weigh the evidence, disbelieve witnesses, and grant a new trial even where there is substantial evidence to sustain the verdict.' " White v. Pence, 961 F.2d 776, 780 (8th Cir. 1992)(citing *Ryan v. McDonough Power Equip.*, 734 F.2d 385, 387 (8th Cir.1984) (citation omitted)). *See also Brown v. Syntex Lab., Inc.*, 755 F.2d 668, 673 (8th Cir.1985) (internal citation omitted)); *Slatton v. Martin K. Eby Constr.* Co., 506 F.2d 505, 508 n. 4 (8th Cir.1974), *cert. denied,* 421 U.S. 931, 95 S.Ct. 1657, 44 L.Ed.2d 88 (1975); and *Bates v. Hensley,* 414 F.2d 1006, 1011 (8th

Cir.1969). In this case it is clear that the verdict is against the great weight of the evidence and a new trial should be granted.

The overwhelming weight of the evidence demonstrates that the Defendant was negligent and his negligence was the legal cause of the collision and of the Plaintiff's injuries.

There were two opposite claims of the actions of the plaintiff in the moments leading up to the collision. The difference between the Defendant's claims and Clint Elmore, an independent eyewitness, were significant. As the Court is aware the Defendant claims that the Plaintiff pulled from the south exit of this Y-intersection onto highway 385 basically making a U-turn back into the south exit when the collision occurred. Defendant's expert, Jubal Hamernik, diagramed Defendant's version of how the accident occurred which was offered to the jury as Defendant's exhibit 219.

Clint Elmore, the independent eyewitness, testified that the Plaintiff was stopped at the north leg of the intersection that he observed the Plaintiff pull onto highway 385 drive a few feet turn his blinker on indicating a turn left or east into the south leg of the intersection. Mr. Elmore testified that he observed the Plaintiff do these things as he traveled north on Highway 385. Mr. Elmore testified that he passed the Plaintiff, as the Plaintiff was slowing near the north end of the south exit and setting up to stop to turn left. Defendant's expert diagramed the north scenario as well; said diagram being marked as Defendant's Exhibit 218.

The differences between the two scenarios are striking. The north exit scenario has the plaintiff traveling 100 feet on Highway 385, while the south version has the defendant traveling north for a distance, then making a u-turn back into the south exit. Not only are the physical paths and the actions of the Plaintiff significantly different in the two versions but so too is the time that the Plaintiff would have been on highway 385 before the collision. Plaintiffs expert and Defendant's expert agreed that it would take between 7 to 9 seconds for a motorcycle to drive from the north exit to the area of impact where the collision occurred. The time the motorcycle was on the highway and its direction of travel is significant because it demonstrates Defendant's negligence in failing to observe Plaintiff.

The only person who believes that the Plaintiff entered from the south exit is the Defendant. Even defendant's expert testified that he believed it was more likely that Warger entered the highway from the north leg of the intersection as opposed to the south as claimed by the Defendant. This is significant because both experts agree that it would take between 7 and 9 seconds for Warger to drive from North exit to the area of impact. That means at a minimum the Plaintiff was between 500 and 650 north of the north leg of the intersection as Warger pulled onto Highway 385[1] Of course this does not account for the time and distance that it would have taken for Mr. Elmore, who witnessed Warger pull from the stop sign, travel south on 385 and slow to a stop, to travel past the

---

[1] 50 m.p.h. equates to 73.3 feet per second. 7 x 73.3 = 513ft. 9 x 73.3 = 659ft.

intersection. Elmore had to be north of the intersection at the time of the collision because he was not involved in the collision and both experts agree that the Defendant's truck and trailer were almost entirely within the north bound lane at the time of the collision. Had Mr. Elmore been in the north bound lane of highway 385 and not been north of the intersection he would have been involved in the collision.

There was no dispute between the experts that it would have taken between 2 to 3 seconds for Mr. Elmore to travel past the intersection going between 35 and 45 miles per hour so as not to be involved in the collision. Adding that 2 to 3 seconds into the equation puts Mr. Shauers another 140 to 210 feet north of the intersection and allows Shauers that much more time to observe what is happening on the highway in front of him and properly slow his vehicle. Without even including the final piece of the analysis, of the time and distance the laws of physics say it takes a vehicle to make a lane change, Mr. Warger would have been on Highway 385 between 9 and 12 seconds before the collision. Thus the overwhelming weight of the evidence supports Plaintiff entering highway 385 from the north exit when the Defendant was more than 900 feet north of the north exit more than 12 seconds away!

The undisputed facts established that Plaintiff would have been on the highway for more than 12 seconds yet the Defendant testified he did not see Plaintiff until he was 100 feet away. Evidence is overwhelming that Shauers failed to keep a proper lookout and control of his vehicle, failed to use ordinary care to avoid putting others in dangers, failed to anticipate the presence on the highway of other

persons and vehicles, was driving at a speed that was greater than reasonable under the conditions. When he realized his negligence and attempted to react to the situation he failed to drive within his lane of travel, improperly attempted to overtake and pass in a no-passing zone and improperly drove on the left side of the roadway at an intersection. As a result of his negligence the collision occurred and Plaintiff incurred significant and permanent injuries.

The court is also permitted to makes its own determination as to the credibility of the witnesses. *White at 780, supra*. Here an examination of Shauers' testimony regarding the moments leading up to the collision demonstrates that his story of what happened continually changed. Originally, Defendant told investigators that he did not see Warger until the motorcycle was entering his lane of traffic. At his deposition Defendant's sworn testimony changed claiming Warger ran the stop sign entering highway 385. When confronted at trial with the question of how he could claim that Warger ran the stop sign if he did not see him until he entered his lane of travel, Defendant then admitted that he just assumed that Warger ran the stop sign.

Likewise at trial Shauers' for the first time claimed that there was a pickup truck with a slide in camper 3 to 4 seconds ahead of him also traveling south. There simply is no way that a truck could have been 3 or 4 seconds ahead of Mr. Shauers as he claimed for the first time at trial. If that had been the case then that truck and not Mr. Shauers would have struck Warger because both experts testified that it would have taken Warger between 7 to 9 seconds to travel from the north

exit to the area of impact. Not even Defendant's expert ever made mention of this truck anywhere in his report or his testimony before the jury. Why? Because the truck did not exist and it could not have happened.

The most telling piece of evidence that suggests Mr. Shauers simply made up the presence of the truck at the trial is Dr. Hamernik's diagrams of the north and south fork scenarios. (Defendant's exhibit 218 and 219) First, neither exhibit shows a truck ahead of Shauers. Dr. Hamernik explained that in his diagrams the positions of the truck and the motorcycle were relative to one another, meaning the first truck and trailer (furthest north) corresponded to the position of the first motorcycle in each scenario. Likewise the second truck corresponded to the second motorcycle etc. If you imagine the pickup truck that Shauers claimed was in front of him in place of the second position of the Shauers truck as they travel south, it is apparent that the phantom pickup would have stuck Warger under either scenario as diagramed by Defendant's expert.

This is yet another example which demonstrates the lack of credibility and plausibility of Defendant's testimony. It is apparent from the evidence that the Defendant was willing to say whatever he felt it took to avoid responsibility for his negligence. But for Defendant's testimony, that is rife with inconsistencies and not even supported by his own expert, there is no support whatsoever for Defendant's claims of negligence on the part of Warger.

"In determining whether a verdict is against the weight of the evidence, the trial court can rely on its own reading of the evidence-it can 'weigh the evidence, disbelieve witnesses, and grant a new trial even where

there is substantial evidence to sustain the verdict.' " White v. Pence, *supra* at 780. The only person suggesting Warger ran the stop sign was the defendant. The only person claiming that Warger entered from the south fork of the intersection was the defendant. The only person claiming that Warger made a U-turn in the middle of the highway is the defendant. It would be a miscarriage of justice to allow Defendant to prevail and the verdict to stand based upon Defendant's unsupported and untruthful version of the events leading up to the collision. Both experts agreed that Warger would have been on the highway for approximately 12 seconds if he entered from the north exit. The Defendant would have been more than 3 football fields away as Warger entered the highway. The evidence of Defendant's negligence in failing to observe Plaintiff is overwhelming. Plaintiff respectfully requests the Court enter and Order granting Plaintiff a New Trial.

2. **The verdict was the product of misconduct on behalf of Defendant's counsel who again violated the Court's Order on Motions in Limine which precluded any testimony regarding legal opinions or violations of rules of the road.**

The court is well aware of the hours that counsel have devoted to the issue of whether any witness could offer testimony that either of the parties violated a legal duty or the rules of the road. The discussion was part of the *Daubert* hearings conducted by the court of the accident reconstruction experts, it was briefed by both sides following that hearing at the request of the court, and it was the topic of numerous conferences

with counsel during both trials. Defendant counsel again, without reason or excuse, violated this Court's Order preventing any witness from testifying or addressing legal duties of an individual operating a motor vehicle or the rules of the road during his examination of Plaintiff's expert Brad Booth.

Defendant's counsel during his examination of Brad Booth stated in one of his questions that Mr. Warger had to yield the right-of-way to any traffic coming down that highway in front of him. Mr. Kappelman's question, like the question of Mr. Booth in the prior trial that resulted in a mistrial, could not have been a more clear violation of the Court's Order. Once again, Mr. Kappelman did not even frame the question where it provoked an innocent answer by the witness. Instead, like his impermissible question in the last trial, the question asked by Mr. Kappelman presented the prohibited evidence to the jury. It did not matter what answer Mr. Booth may have given, Mr. Kappelman accomplished what he wanted and created in the mind of the jury very early on in the proceedings that Mr. Warger had a duty to yield to Defendant. That question prejudiced the verdict and the Plaintiff because Plaintiff was unable to present any evidence or testimony by Mr. Booth or any other witness to cure the prejudice that Mr. Kappelman already had caused.

"A violation of an order granting a motion in limine may only serve as a basis for a new trial when the order is specific in its prohibition and the violation is clear." Black v. Shultz, 530 F.3d 702, 706 (8th Cir. 2008)(citation omitted). "A party is entitled to a new trial only where the violation constitutes prejudicial error or results in the denial of a fair trial." *Id.* (citation

omitted). "Prejudicial error is error which in all probability produced some effect on the jury's verdict and is harmful to the substantial rights of the party assigning it." *Id.* (citations omitted).

Here there can be no dispute that counsel's question violated this Court's Order. The prejudice to the Plaintiff is obvious from the verdict returned by the jury against the Plaintiff. As noted above, Plaintiff did not have the opportunity to address the prejudice that Mr. Kappelman caused. Moreover, Mr. Kappelman in his closing argument to the jury suggested that there was no dispute that Plaintiff had a duty to yield to traffic coming down the hill. Plaintiff was not able to overcome that argument or the prejudice caused by the question. Defendant's counsel should not be rewarded by again intentionally violating this Court's Order. The fact of the matter is that this very topic had been addressed at least a dozen different times prior to Mr. Kappelman intentionally violating the Order, Mr. Kappelman knew the question was impermissible yet he chose to try and slip it by to place the seed in the mind of the jury during Plaintiff's case in chief. This tactic should not be rewarded. Asking question was an intentional violation of the Court's Order, It caused prejudice to Plaintiff and the Court should set the verdict aside and grant Plaintiff a new trial.

3. The verdict was the product of juror misconduct.

Less than one week after the jury returned its verdict one of the jurors, Mr. Stacey Titus, stopped by the law office of Plaintiff's counsel and asked to speak to either Mr. Beardsley or Mr. Jones. When Mr. Beardsley was summoned to the lobby he immediately

recognized Mr. Titus as one of the jurors from the case and advised Mr. Titus that he could not visit with him about the case because local rules prohibit speaking with jurors until their term of service is completed. The Court, at post trial hearings, released all of the jurors who served on the case from further juror duty and permitted counsel to contact any juror as they saw fit.

Thereafter Mr. Beardsley and Mr. Jones met with Mr. Titus. Mr. Titus advised Plaintiff's counsel that the reason he had stopped by and wanted to visit with counsel is that he did not feel that Plaintiff was given a fair chance in deliberations. One of the jurors, who happened to be the foreperson, focused not on the facts of the case and fault, but rather on how this case related to a similar automobile accident that involved her daughter. (See Affidavit of Stacy Titus, Exhibit 1).

Mr. Titus advised he was concerned because he did not believe that juror was willing to consider any of the facts or evidence of the case presented to the jury. This juror was more concerned about the effect on her daughter if she had been sued. This juror stated a lawsuit would have ruined her daughter's life like it would ruin the defendant and his family. For that reason she could not return a verdict for the Plaintiff.

Mr. Titus advised he was concerned with the position that the juror was taking in deliberations in contrast with the answers she provided during jury selection. Mr. Titus advised us that his concern rose to the level that following the verdict in an effort to deal with the dilemma he sought advice from one of the City Attorneys regarding whether he had an obligation to report this impropriety to the Court. Thereafter Mr. Titus stopped by counsels' law offices.

According to Mr. Titus, the juror, Mrs. Whipple, indicated to him and others that she could not vote in favor of the Plaintiff because it would ruin the lives of the Defendant and his family and the same thing would have happened to her daughter had her daughter been sued for the accident she caused. Mr. Titus was concerned that other juror also picked up on the foreperson's position because other jurors also expressed their concern about returning a verdict for the Plaintiff and ruining the Shauers' lives as they were a young couple.

It is apparent from the verdict that the foreperson's comments prejudiced the Plaintiff and resulted in a verdict for the Defendant. During voir dire, the members of the panel were questioned whether they would have any difficulty returning a substantial award in favor of the Plaintiff if the damages supported such an award. Mrs. Whipple did not indicate that she would be unable to return a verdict in favor of the Plaintiff. She made no mention regarding the serious accident that her daughter had been involved in or her strong feelings that a lawsuit such as this would ruin the Defendant's life. Nor did she state that she would not be able to set her feelings aside and render a verdict on the evidence and law as instructed by the Court. The jury instructions given to the jurors demanded that "Neither sympathy nor prejudice should influence you. Your verdict must be based on evidence and not upon speculation, guess or conjecture. The law demands of you a just verdict, unaffected by anything except the evidence, your common sense, and the law as I gave it to you." (Final Instruction No. 1).

Here there is evidence that the jury allowed sympathy to direct the verdict and prevented the jury from discussing the facts and the law of the case. Here the foreperson injected her personal story into the deliberations. It was apparent to Mr. Titus that other jurors bought into the foreperson's perspective, that being that a verdict for the plaintiff would ruin the lives of the defendant's family. Given the fact that it was the foreperson who injected discussion of her daughter's experience and suggested that the lawsuit would destroy the Defendant's family, it was particularly prejudicial to the Plaintiff. A vote against the Defendant would also have been a vote against the foreperson of the jury.

WHEREFORE, Warger requests that this Court enter judgment in his favor, or, in the alternative, that it set aside the jury verdict and order a new trial in this case.

Respectfully submitted this 25th day of October, 2010.

BEARDSLEY, JENSEN & VON WALD, Prof. L.L.C.

By: /s/ Travis B. Jones
Steven C. Beardsley
Travis B. Jones
4200 Beach Drive, Suite 3
P.O. Box 9579
Rapid City, SD 57709
Telephone: (605) 721-2800
Facsimile: (605) 721-2801
Email: sbeards@blackhillslaw.com
tjones@blackhillslaw.com

* * *

[Certificate of Service Omitted for Purposes of this Appendix]

STATE OF SOUTH DAKOTA)
)ss.
COUNTY OF PENNINGTON)

AFFIDAVIT OF STACEY TITUS

Stacey Titus, being first duly sworn, deposes and states as follows:

1. My name is Stacey Titus. I am a Civil Engineer, employed by the City of Rapid City.

2. I served as a juror on the Greg Warger v. Randy Shauers trial.

3. Following the jury trial, which lasted approximately eight days, I was concerned about what had transpired in deliberations and stopped at the offices of Beardsley, Jensen & Von Wald, to visit with Steve Beardsley or Travis Jones.

4. The biggest concern I had during jury deliberations was the attitude and comments by some of the jurors to not consider the facts and evidence of the case. It was evident to me that one juror, who ended up being the foreman, was influenced by her own daughter's experience, and not the facts, evidence, and law that was presented to us.

5. The juror, who ended up being the foreperson, during deliberations spoke about her daughter's experience, which included a motor vehicle collision in which her daughter was at fault for the collision and a man died. She related that if her daughter had been sued, it would have ruined her life. She further indicated that her daughter sat down and visited with the family of the deceased person and gave them flowers at the 5 year anniversary of the collision.

6. It is obvious that this juror was more concerned about the issues involving her daughter than she was the facts, evidence, and law presented by this Court and counsel. It was apparent that this comment may have been made to and influenced other jurors because other jurors also expressed their concern about ruining the Shauers' life as they were a young couple.

7 Following the verdict I was concerned about the dilemma of the juror ignoring the dictates of the Court and the law. I sought advice from one of the City Attorneys regarding this matter and regarding whether I had an obligation to report to the Court the impropriety I observed.

8. I am still concerned regarding the bias expressed by this juror. I am concerned that the juror influenced other jurors by stating that her daughter's life would have been ruined if a lawsuit had been filed against her in her collision.

Further your affiant sayeth not.

Dated this 25 day of October, 2010.

/s/ Stacey Titus
Stacey Titus

Subscribed and sworn to before me this 25th of October, 2010.

/s/ Travis B. Jones
Notary Public
My Commission Expires:

Travis B. Jones, Notary Public
My Commission Expires
March 24, 2011

[Seal]

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

Civ No. 08-5092-JLV

[Filed November 26, 2010]

GREGORY P. WARGER,

Plaintiff,

v.

RANDY D. SHAUERS,

Defendant,

PLAINTIFF'S REPLY TO DEFENDANT'S BRIEF IN OPPOSITION TO PLAINTIFF'S MOTION FOR JUDGMENT AS A MATTER OF LAW OR A NEW TRIAL

Plaintiff Gregory P Warger, by and through his attorneys of record, respectfully submits this Reply Brief to Defendant's Brief in Opposition to Plaintiff's Motion for Judgment as a Matter of Law or New Trial.

1. The verdict is against the weight of the evidence and a new trial should be granted.

"In determining whether a verdict is against the weight of the evidence, the trial court can rely on its own reading of the evidence-it can 'weigh the evidence,

disbelieve witnesses, and grant a new trial even where there is substantial evidence to sustain the verdict,' " White v. Pence, 961 F.2d 776, 780 (8th Cir. 1992)(citing *Ryan v. McDonough Power Equip.*, 734 F.2d 385, 387 (8th Cir.1984) (citation omitted)). See *also Brown v. Syntex Lab., Inc.*, 755 F.2d 668, 673 (8th Cir.1985) (internal citation omitted)); *Slatton v. Martin K. Eby Constr.* Co., 506 F.2d 505, 508 n. 4 (8th Cir.1974), *cert. denied,* 421 U.S. 931, 95 S.Ct. 1657, 44 L.Ed.2d 88 (1975); and *Bates v. Hensley,* 414 F.2d 1006, 1011 (8th Cir.1969). In this case it is clear that the verdict is against the great weight of the evidence and a new trial should be granted. To determine whether the verdict is against the great weight of the evidence and the Defendant's claim of how the accident occurred, the Court need only to examine the Defendant's in court testimony of how the accident occurred and the events leading up to it.

The most telling piece of evidence was Defendant's testimony at trial where for the first time Defendant claimed that there was a pickup truck with a slide in camper 3 to 4 seconds ahead of him also traveling south. Defendant argued that it must have been that truck that Elmore observed and not Shauers. However as explained by Plaintiff in his initial brief there simply is no way that a truck could have been 3 or 4 seconds ahead of Mr. Shauers as he claimed. If that had been the case then that truck and not Mr. Shauers would have struck Warger. It is clear that Mr. Shauer's testimony was not credible. The simple fact of the matter is that he made up the existence of the truck at trial. Defendant's expert never made mention of this other truck anywhere in his report or his testimony before the jury. Nor did Defendant's expert include this

other truck into any of his diagrams of how the accident occurred.

The Court should not have to look any further to determine that a miscarriage of justice occurred. It is apparent from the evidence that the Defendant was willing to say whatever he felt it took to avoid responsibility for his negligence. But for Defendant's testimony, there is no support whatsoever for Defendant's claims of negligence on the part of Warger. "In determining whether a verdict is against the weight of the evidence, the trial court can rely on its own reading of the evidence-it can 'weigh the evidence, disbelieve witnesses, and grant a new trial even where there is substantial evidence to sustain the verdict.' " White v. Pence, *supra* at 780.

In this case there is a lack of evidence to support the verdict. As shown above, the Court should disregard Defendant's testimony because it is not supported by the facts and it is apparent from the Defendant's testimony under oath that he was being less than truthful regarding the events leading up to the accident. The only unbiased evidence received by the jury was that of Clint Elmore, a law enforcement officer with more than 30 years in law enforcement. Mr. Elmore's testimony was clear and unequivocal. He observed the Plaintiff stopped at the north fork of the intersection waiting to pull onto highway 385. Elmore observed the Plaintiff pull onto the highway and turn on his blinker indicating a turn back onto Sheridan Lake road. Elmore observed Plaintiff travel down highway 385, near the centerline, and come to almost a complete stop before he passed him. Elmore continued up the hill and then observed Plaintiff

traveling way to fast, coming down the hill. Elmore testified that as he passed Defendant he saw the Defendant with his head turned to the right. Concerned that the Defendant did not see the Plaintiff and that an accident would occur, Elmore looked in his rearview mirror and observed the collision occur.

The overwhelming weight of the evidence supports Elmore's observations and testimony of how the accident occurred. Simply put, but for Defendant's testimony, there was no testimony by any witness that Plaintiff did anything wrong. It is apparent from the facts of the case that Defendant's testimony is not trustworthy and generally lacks credibility. Setting aside Defendant's testimony, there is no evidence upon which reasonable minds could differ. It is clear that a miscarriage of justice has occurred and that the court should grant Plaintiffs Motion for a New Trial.

2. The verdict was the product of misconduct on behalf of Defendant's counsel who again violated the Court's Order on Motions in Limine which precluded any testimony regarding legal opinions or violations of rules of the road.

In their brief Defendant asserts that they did not violate the Court's Order which strictly prohibited inquiring of any witness any testimony regarding legal opinions of the cause of the accident or violations of the rules of the road. Defendant claims that his question of Mr. Booth that gave rise to Plaintiff's objection and motion for mistrial, "[i]n no way, shape, or form violated the spirit or letter of the Court's Order." (Doc. 180, p. 7). The Court, however, was very clear that the question violated the Court's Order. At the time of

Plaintiff's objection, the Court admonished Defendant's counsel and inquired of him "what is it about my ruling that you don't understand?"

Defendant also mistakenly alleges that Plaintiff did not request a curative instruction, thereby waiving any claim that Plaintiff was prejudiced by the question. (Doc. 180, page 7). First, Defendant does not cite any legal authority to support this claim. Moreover, Defendant's allegation ignores the fact that Plaintiff moved for a mistrial. Moreover, over Plaintiff's objection in not granting the mistrial the Court gave an curative instruction to the jury. It is apparent from the verdict that the admonishment was insufficient to cure the prejudice suffered by Plaintiff as a result of Defendant's violation of the Court's Order.

Finally, Defendant's reliance on *Black v. Shultz,* 530 F3d 702, 706 (8th Cir. 2008) is misplaced. The violation of the pretrial order in *Black* is not akin to the violation of the Court's pretrial order in this case. In *Black* the order was violated by an inadvertent answer by a witness. *Id.* In this case, the order was intentionally violated by Defendant's counsel who directly asked an impermissible question seeking an impermissible answer. Here Defendant asserts that there is no error because there was no answer to the question. The fact that Mr. Booth did not answer the question should not provide an excuse for Defendant's intentional violation.

Defendant's argument ignores the fact that the question posed by counsel violated the Court's Order. Moreover, counsel for Defendant had been down this road before and had previously caused a mistrial for which he was sanctioned. Defendant alleges that this violation was not as severe as his previous violation

and should not serve as the basis for a new trial. That should not be a defense or an excuse for granting a new trial for Defendant's counsel's intentional violation of the Court's Order.

Defendant also alleges that Plaintiff has presented no evidence that the violation was prejudicial to Plaintiff. Plaintiff addressed in his initial Brief the fact that Defendant capitalized on his violation of the Order during closing argument when he repeatedly argued to the jury that both Mr. Booth and Mr. Hamernik agreed that Plaintiff had a duty to yield to Defendant. The evidence is clear that Defendant's utilization of his violation of the Order in closing argument, undoubtedly prejudiced Plaintiff and the verdict in violation of the Court's pretrial Order.

3. The verdict was the product of juror misconduct.

Defendant alleges that the Court should strike the affidavit of juror Stacey Titus because it does not strictly comply with the requirements of FRE 606(b). FRE 606(b) provides that a juror may testify about (1) whether extraneous prejudicial information was improperly brought to the jury's attention (2) whether any outside influence was improperly brought upon any juror or (3) whether there was a mistake in entering the verdict onto the verdict form. Juror Titus' affidavit complies with FRE 606(b) because it contains information regarding extraneous prejudicial information that was brought to the jury's attention by way of another juror. As explained by Titus, the extraneous information was interjected by juror Whipple of how a verdict would ruin the defendant's life and her experience with her daughter and the

accident she was involved in. As explained by Titus, that information shifted the focus away from the evidence presented and onto the effect the verdict would have on the Defendant and his family. This prejudiced Plaintiff because the jury disregarded the evidence of Defendant's negligence in bringing about the accident. Moreover, as explained by Titus in his affidavit, this is not a case where Titus was sought out by counsel after the verdict but rather one where he sought out counsel to share with them his concerns for the verdict and the extraneous information that was brought into the jury room and how it affected the verdict.

Defendant does not challenge the validity of the contents of the affidavit of Titus. Likewise Defendant has failed to submit any opposing affidavits to suggest that what Titus has stated in his affidavit is incorrect. Rather, Defendant simply wants the Court to ignore the affidavit and the improper method in which the jury reached its verdict. The facts of this case and the misconduct of the jury is not analogous to the case of *Banghart v. Origoverken, A.B.*, 49 F3d 1302 (8th Cir. 1995) where the jury conducted an experiment during deliberations. In *Banghart* the jury was testing the validity of the testimony of one of the experts by dropping toothpick and matches into a stove that had been admitted into evidence. *Id.* The court found that neither the toothpicks or matches, nor the experiment conducted by the jurors constituted extraneous evidence. *Id.* The court held that the toothpick and matchers were not evidence but rather merely objects used in scrutinizing the physical nature of the piece of evidence upon which the case turned ... *Id. at 1306.*

Here in this case the jury did not perform any tests to analyze the evidence, rather the jury failed to consider the overwhelming evidence of the Defendant's negligence based upon the statements of Ms. Whipple the foreperson who interjected into the deliberations the affect of a verdict against the defendant and how it would destroy the defendant's life like it would have her daughter had a lawsuit been brought against her in the accident wherein she killed someone.

The fact that the jury was more focused on the effect of the verdict against the defendant than it was in analyzing the evidence shows the prejudicial effect of the foreperson interjecting her daughter's experience into the deliberations. As a result the Plaintiff was prejudiced because the jury neglected to analyze the evidence and return a verdict for the Plaintiff based upon the overwhelming evidence of the defendant's negligence.

WHEREFORE, Warger requests that this Court enter judgment in his favor, or, in the alternative, that it set aside the jury verdict and order a new trial in this case.

Respectfully submitted this 26th day of November, 2010.

BEARDSLEY, JENSEN & VON WALD, Prof. L.L.C.

By: /s/ Travis B. Jones
Steven C. Beardsley
Travis B. Jones
4200 Beach Drive, Suite 3
P.O. Box 9579
Rapid City, SD 57709
Telephone: (605) 721-2800
Facsimile: (605) 721-2801
Email: sbeards@blackhillslaw.com
tjones@blackhillslaw.com

* * *

[Certificate of Service Omitted for Purposes of this Appendix]

APPENDIX D

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

CIV NO. 08-5092

[September 20, 2010]

GREGORY P WARGER,
PLAINTIFF,
vs.
RANDY D. SHAUERS,
DEFENDANT.

SEPTEMBER 20, 2010
RAPID CITY, SOUTH DAKOTA

TRANSCRIPT OF JURY TRIAL
VOIR DIRE EXAMINATION OF THE JURY

BEFORE THE HONORABLE JEFFREY L. VIKEN,
UNITED STATES DISTRICT JUDGE AND A JURY

APPEARANCES:

FOR THE PLAINTIFF:

STEVEN C. BEARDSLEY, ESQ.
TRAVIS B. JONES, ESQ.
Beardsley, Jensen & Von Wald
4200 Beach Drive, Suite 3
Rapid City, South Dakota 57702

FOR THE DEFENDANT:

RONALD R. KAPPELMAN, ESQ.
GREGORY G. STROMMEN, ESQ.
Banks, Johnson, Colbath, Sumner & Kappelman
731 St. Joseph Street
Rapid City, South Dakota 57701

COURT REPORTER:

JUDITH M. THOMPSON, R.P.R.
Official Court Reporter
909 St. Joseph Street
Suite 505
Rapid City, South Dakota 57701

[p. 2]

(Following proceedings in open court)

THE COURT: My name is Jeffrey Viken. I am a United States District Judge for the District of South Dakota, and it is my honor and pleasure to work with you as prospective jurors for this civil case.

With us this morning is Judy Thompson, our court reporter. Jeana Holso, our deputy clerk, who will be working with us throughout the course of the trial. And my law clerk, Tamie Sawaged.

Would counsel please introduce yourselves and your clients.

MR. BEARDSLEY: Thank you, Your Honor. My name is Steve Beardsley. I represent Greg Warger along with my partner, Travis Jones. And Wendy Hanken is my assistant, also.

THE COURT: Thank you. Defense, please.

MR. KAPPELMAN: Thank you, Your Honor. My

name is Ron Kappelman. This is my client, Randy Shauers. My partner Greg Strommen and Nick Carda, assistants with our office.

THE COURT: Thank you, gentlemen.

Jeana, would you please swear our panel, please.

(Panel sworn.)

THE COURT: Ladies and gentlemen, 18 of your number have been selected randomly by computer to be called

[p. 3]

into the jury box for the jury selection process. So at this time, Jeana, if you would please call those randomly selected 18 names.

DEPUTY CLERK OF COURT: Judith Abdo, Regina Whipple, Raymond T. Williams.

THE COURT: I have Raymond Reynolds.

DEPUTY CLERK OF COURT: So sorry. Raymond Reynolds. Billie Lee McCamly, Allan Zandstra, Barton Isaac Goodwin, Annette Gilby-Merritt.

The next seven persons will go to the second row beginning in the far right. Debra Simpson, Sheila Smith, Mike Besso, Stacey Titus, Terry Whitmyre, Jason Tripp, Michael Napier-- I'm sorry. Evidently Mr. Napier is not here. The next name on our list is Joan Lemmel.

The next four jurors if you could take a seat in the last row, again, on the far right. Johnnie Boje.

JUROR: Jamie. Johnnie Knapp, David Rubins, and Joan Murphy-- and David Murphy.

THE COURT: Thank you, Jeana.

Ladies and gentlemen, Arnie is the court security officer, the gentleman who is holding the gate open for you so you could come and go. We will have the court security officers with us throughout the trial.

I am going to ask you some questions for those of you who have been called randomly into the jury box for

[p. 4]

jury selection. Those of you who have not been called if you would please listen carefully to my questions and then to the questions asked by the attorneys; in the event one of our jurors is excused for any reason, Jeana will call the next name on the randomly-selected list to replace the person excused, and then you will be asked, if you are replaced in the jury box, if you have any responses to the questions which have already been asked. So your attention to the questions is greatly appreciated and you are a real service to your fellow prospective jurors here because if one of them is excused for cause or for any reason, we will need you to serve. So I appreciate that very much.

I am going to ask you some questions, ladies and gentlemen, to make certain that you are completely objective and free from bias or prejudices of any kind regarding this case. Any citizen may be a proper juror for a particular case, but in this instance, we have a civil case so we are really going to ask questions and help you decide whether for this particular case you are

a fair and impartial juror. You may be a great juror for a criminal case or some other civil case, but not for this case because of your own experiences in life or opinions or beliefs which you hold. So please, the key to this jury selection process is candor and honesty. If you have personal opinions, biases, religious beliefs, notions of

* * *

[p. 49]

proof? Is it okay for the plaintiff according to law can recover; they just need to show a little more, more likely than not it occurred?

MS. GILBY-MERRITT: Yes.

MR. BEARDSLEY: That's okay?

MS. GILBY-MERRITT: Uh-huh.

MR. BEARDSLEY: Anybody -- I don't want to call everybody's name -- anybody say, "You know, I think it's got to be more. I think he's got to have it way up here." Anybody feel that way that just kind of has a thought, "No, no, I think it should be more?"

MR. GUTHRIE: Are you talking about the amount or just who?

MR. BEARDSLEY: We are going to get to the amount.

MR. GUTHRIE: I mean, what are you saying? There's three different things you are asking. Are you saying-- I mean, the way you were phrasing it you are saying is it okay to find for your client, yeah, you do only need greater substantial force, or whatever, but as to the amount maybe you mean for both?

MR. BEARDSLEY: Okay. Very good question. Let me break it down and how you feel. Very good question. The law is, as the Judge will instruct, that you have to prove your case by a greater convincing force and there's

[p. 50]

two parts. One part is causation or liability; the other part is the amount of damages that we have proved. So as to liability, yes, it's greater convincing force, it's just a little bit more. More likely than not. You okay with that?

MR. GUTHRIE: Yes.

MR. BEARDSLEY: Now I am going to go to the injuries; we are going to talk about the injuries. Okay. Again, the burden of proof of proving the injuries is still just slightly higher than not proving it. Now, in this instance, we have two doctors that did a whole series of surgeries on this gentleman. There aren't any doctors that say he didn't get injured; that's not an issue. The issue on how much burden of proof is we have the burden of proof; the plaintiff has the burden of proof of proving how much injury he has not only from that day, or that the series of surgeries he had, but how does that affect his life? And we are going to prove that. And then as a group, the 12 of you, if you decide for Mr. Warger, then we'll decide what is fair compensation for his losses and that is a burden, same kind as fair and convincing force. You still look confused.

MR. GUTHRIE: Well–

MR. BEARDSLEY: Am I right?

MR. GUTHRIE: You are asking for a tipping of the

[p. 51]

scales on a graduated curve, right? So are you saying we have got to decide where the scales tilt along this curve?

MR. BEARDSLEY: Let me give you an example. Loss of earning capacity, loss of earnings during the time that he's in the hospital, in the nursing home; you know, if there were some evidence on the other side that said, no, I don't think he lost 15, $16,000; he really only lost 8, then the jury would determine shall we consider loss of earnings and then decide based on greater convincing force. Okay. So they are each part of the damage. Medical expenses are over $367,000. If we prove on tipping the scales that, yeah, this is what he incurred and they are responsible for it, then by law, that's part of what the jury should consider in determining how much damages. Okay. Do you understand that?

MR. GUTHRIE: Yeah. I mean, if you have a black and white amount it's easy to make that kind of decision. Yeah, it's owed. But I don't see how you can balance two, like an amount over the black amount; I mean, black and white amount that's been transacting; or I don't see how you can convert the two.

MR. BEARDSLEY: Let me try the other way. Very good questions. I appreciate your discussion. Hopefully everybody else is listening as well. There are certain things we are going to ask as damages. I am going to ask

[p. 52]

if anybody has any problem with it. One is medical expenses incurred, black and white, $367,000 plus. Okay. Then there's future prosthetics because this leg, he has a leg from here on down, needs to be replaced because it wears out every three to five years. It's extremely expensive. And there would be testimony by us by doctors and by a prosthetic man that it will cost, over his life-expectancy, anywhere from 5 to $800,000 to replace the leg; that's another black and white, but there could be some discussion about it. But it leads me into-- and the Judge will also instruct -- allowing a number for the pain and suffering that he's experienced and will experience the rest of his life. Now, that is a lot less black and white than medical expenses and future medical expenses. Okay? You following me?

MR. GUTHRIE: And I don't think-- I don't know that, that what you are talking about, I don't know that I could-- I don't know that anybody could be instructed on what's right and wrong there. I don't think you can say, hey, this is a formula we are going to plug in. It would be my personal opinion whether-- you know, what I think is right. I don't think anybody can tell me what is right or wrong in that case. I don't think it's possible.

MR. BEARDSLEY: The Judge will give you categories of allowance of damages for injury: medical

[p. 53]

expenses, future medical expenses, pain and suffering, loss of enjoyment of life. And he doesn't tell you to do any of those. He leaves it up to 12 people to get their heads together and talk about it and decide what is fair

compensation. So he's not going to tell you. We are going to talk to you about it; and then you guys, if you get to that issue, will decide what's fair and reasonable compensation. If it's like that, are you comfortable with that concept where 12 people then will get together and look at the options the Judge gives you and make decisions? Are you okay with that?

MR. GUTHRIE: See how it applies to this greater force thing? I mean, then we are just going in with our opinion; we are not really objectively looking at any sort of fact is the way it feels like to me. Feels like we are just going to go in and render our opinion as let's do that, that's cool. I can do that. But I don't see how that applies.

MR. BEARDSLEY: Greater convincing force.

MR. GUTHRIE: Yes.

MR. BEARDSLEY: The burden on the plaintiff if they are going to claim pain and suffering, use your common sense, the burden of the plaintiff is they don't have to prove pain and suffering beyond a reasonable doubt, they only have to prove it in a greater convincing force. Or

[p. 54]

loss of enjoyment of life at a reasonable --beyond a reasonable doubt. Loss of enjoyment of life would be greater convincing force. That's just a burden. You have to take all of this as jurors and come together and make decisions. Okay?

I do want to talk to you about whether or not if we prove our case if you are comfortable of the awarding of

medical expenses if we prove, even though it's a large number, if we prove that medical expenses incurred are $367,000, raise your hand if anybody has a problem with if we prove our case awarding those kind of medical expenses; anybody have a problem?

We are also going to present evidence of future medical expenses: medicine; he takes Neurontin because he has what's known at phantom pain. And the doctors will talk about that, as he will. That even though his leg is gone, the nerves have been cut and it goes all the way down and he feels sensation in his entire leg and has pains and he'll talk to you about that. And so he needs medication for that.

In addition this concept that you have to replace the prosthetic leg, a socket and the leg, between three to five years. You will hear the testimony about that and the future cost of life expectancy is anywhere from $500,000 to $800,000.

I am going to be more specific on this. Ms. Abdo, do you have a concern about future medical expenses like I talked about the medications and the prosthetic device? Can you award that if we prove our case?

MS. ABDO: Yeah, I sure could. I kind have been through a situation with this. My husband was in an accident at work and ended up only living 12 days. And then I got a divorce from that and I really didn't think it was ever going to be enough, I mean, because I couldn't ever get him back, so I really have no problem with that part whatsoever.

MR. BEARDSLEY: Thank you. How about Ms. Whipple, the concept of future medical expenses, any problem with that?

MS. WHIPPLE: No.

MR. BEARDSLEY: If we prove our case. Mr. Guthrie? Depends on this --

MR. GUTHRIE: No. I mean, if it completely wipes him out is it fair? I mean, if it's an accident why should he and his family suffer forever? I don't know what happened.

MR. BEARDSLEY: The duty of the jury is to decide liability and decide what's fair compensation, not the effect of that. Just the numbers. You understand that?

MR. GUTHRIE: Yeah, I understand that. I don't

[p. 56]

know if that is right.

MR. BEARDSLEY: You have a concern. Thank you. Mr. McCamly, how do you feel about future medical expenses? Even though it's a big number, are you comfortable with that if we prove it?

MR. MCCAMLY: If you prove it, I believe he's entitled to it. Has he been -- has there been a guilty – was he in the wrong doing his traffic violation? Was he found guilty of doing something wrong? I don't know the facts of the case yet, but if we are here for medical reasons, if he's entitled to it, and we put our heads together and come up with it, then I have no problem with him being compensated.

MR. BEARDSLEY: Thank you And in half answer to your question, this is a civil case; nobody is going to jail, nobody is going to be found guilty, but

responsible, liable, and the Judge will give instructions on that and determine if the defendant is liable, and then you go on to the damage issue.

Mr. Zandstra, are you comfortable with future medical expenses even though it's a substantial number if we prove it?

MR. ZANDSTRA: As long as you prove it.

MR. BEARDSLEY: Mr. Goodwin.

MR. GOODWIN: Yes.

[p. 57]

MR. BEARDSLEY: Ms. Merritt.

MS. GILBY-MERRITT: As long as you prove it.

MR. BEARDSLEY: Ms. Lemmel.

MS. LEMMEL: As long you prove it.

MR. BEARDSLEY: Mr. Tripp.

MR. TRIPP: Yes.

MR. BEARDSLEY: Ms. Whitmyre.

MS. WHITMYRE: Probably.

COURT REPORTER: I didn't hear what she said.

MR. BEARDSLEY: She said probably and she kind of wrinkled up her nose and nodded.

Mr. Titus.

MR. TITUS: Yes.

MR. BEARDSLEY: Mr. Besso.

MR. BESSO: I am fine with it.

MR. BEARDSLEY: Ms. Smith.

MS. SMITH: Yes.

MR. BEARDSLEY: Ms. Simpson.

MS. SIMPSON: Yes.

MR. BEARDSLEY: Ms. Boje.

MS. BOJE: Yes.

MR. BEARDSLEY: Mr. Knapp.

MR. KNAPP: Yes.

MR. BEARDSLEY: Mr. Rubins.

MR. RUBINS: Yes.

[p. 58]

MR. BEARDSLEY: Mr. Murphy.

MR. MURPHY: Yes.

MR. BEARDSLEY: Now I am going to get to the tough stuff. Some people I know are uncomfortable awarding damages for pain and suffering. Some people have religious beliefs or background beliefs, or whatever, that are just uncomfortable in awarding for pain and suffering. I have friends that don't know. Then some people say, no, somebody went through what he went through, that, yeah, I can award a number; I can award money damages for pain and suffering. And I kind of need to know where people feel about that. Ms. Boje, are you closer to: I can't award for pain and suffering or closer to that you think you can

under the right circumstances?

MS. BOJE: Money is not going to make everything better. I have never had a real attachment to money because it doesn't make me happy, so just because I am hurt and I suffered through this, it's not going to make me feel better about that time. I am not going to be able to-- yeah, I will go buy a car, or whatever; that doesn't make me better about it, so I don't know if I could see that side of things.

MR. BEARDSLEY: You are not sure?

MS. BOJE: No.

MR. BEARDSLEY: Okay. That's fair.

[p. 59]

Ms. Merritt, how do you feel about it? You closer to I can't award for pain and suffering or, yeah, I can award for pain and suffering?

MS. GILBY-MERRITT: Yeah.

MR. BEARDSLEY: You think you can?

MS. GILBY-MERRITT: Yes.

MR. BEARDSLEY: Mr. Knapp, how do you feel? Every time I call on you, you just smile at me. What do you think? Closer to I can't do it or closer to yeah, I think there probably is some I could award?

MR. KNAPP: Probably so.

MR. BEARDSLEY: Mr. Rubins, how about you?

MR. RUBINS: Closer to I can.

MR. BEARDSLEY: Mr. Murphy?

MR. MURPHY: Yeah.

MR. BEARDSLEY: Mr. Zandstra.

MR. ZANDSTRA: Some.

MR. BEARDSLEY: Mr. McCamly?

MR. MCCAMLY: I believe some.

MR. BEARDSLEY: Ms. Lemmel?

MS. LEMMEL: Yes.

MR. BEARDSLEY: Mr. Tripp?

MR. TRIPP: Yes.

MR. BEARDSLEY: Ms. Whitmyre. Now this time you are shaking your head no.

[p. 60]

MS. WHITMYRE: No. I just don't see if it was an accident and wasn't something done deliberate you've got to accept some responsibility. I don't feel somebody should have to pay because you just get your life going again. I have had things happen, too. You bite the bullet and get going again.

MR. BEARDSLEY: Does it make a difference to you that when the Court instructs that the cause of the collision doesn't have to be intentional and the cause of the pain and suffering does not have to be intentional that it can be a negligence or a carelessness, would that make a difference to you? Could you follow the law if the Judge said, no, it doesn't have to be intentional to consider pain and suffering?

MS. WHITMYRE: I will follow the law.

MR. BEARDSLEY: That's fair. I understand your feelings. Thank you.

Mr. Titus, how do you feel about pain and suffering? Closer to I can award it or closer to I can't?

MR. TITUS: I could award.

MR. BEARDSLEY: Mr. Besso.

MR. BESSO: I could.

MR. BEARDSLEY: Ms. Smith.

MS. SMITH: I could.

MR. BEARDSLEY: Ms. Simpson.

[p. 61]

MS. SIMPSON: I could.

MR. BEARDSLEY: Ms. Abdo.

MS. ABDO: I could.

MR. BEARDSLEY: Ms. Whipple.

MS. WHIPPLE: Yes.

MR. BEARDSLEY: Mr. Guthrie.

MR. GUTHRIE: Yes.

MR. BEARDSLEY: Now that I tried to mix it up I don't know if I got everybody. Did I miss anybody on that issue?

MR. GOODWIN: Yeah, me.

MR. BEARDSLEY: I'm sorry. And you kind of told me I think earlier, but what do you think about pain and suffering?

MR. GOODWIN: Yeah, I'd pay for it.

MR. BEARDSLEY: Thanks. I'm sorry. Anybody else? Thank you.

This is an important case. It's important for a lot of reasons because it has to do with rules of the road, it has to do with how you drive trucks, how you drive motorcycles, and it will make a difference. And there may be media coverage; there may be, I don't know. There may be coverage because we are asking for a substantial sum. And some people don't want to be put in a spot where they have to make such an important decision. If you would

[p. 62]

raise your hands, all of you, if you are comfortable making this important decision on this case. Can you do that? Mr. Guthrie, Mr. Goodwin, and Ms. Boje. Mr. Goodwin, you are uncomfortable doing this?

MR. GOODWIN: To an extent.

MR. BEARDSLEY: And does it go back to your own experience or something else?

MR. GOODWIN: Goes back to my own experience.

MR. BEARDSLEY: And you just sit here and have concerns for making such an important decision?

MR. GOODWIN: Yes.

MR. BEARDSLEY: Thank you. Mr. Guthrie, did

we talk about it earlier when we were talking about the greater convincing force or is it something else?

MR. GUTHRIE: Pretty much along those lines. I don't believe I am comfortable trying to decide something who is liable.

MR. BEARDSLEY: That's fair. I'm glad you are talking. It's hard to come to a spot where you've never been on a jury and all of a sudden some attorneys are asking you questions and you got to volunteer in front of a whole group. I appreciate your comments. You are speaking from the heart; that's what we need.

Ms. Boje, was it the concern you talked about earlier or is it something else?

[p. 63]

MS. BOJE: No, it's the same with the motorcycle; it's how I feel that it really could be their fault, motorcycle's fault; and in this instance, at least with the facts that I was given so far.

MR. BEARDSLEY: And that's your concern because it's an important case and you're just not sure yet?

MS. BOJE: Yeah.

MR. BEARDSLEY: Thank you.

THE COURT: Mr. Beardsley, we are going to take a 10-minute recess. If you are serving as jurors in the case -- we will work through this together -- we will take a break about every hour and a half. Our court reporter has an intense job following the testimony and writing down every word, but also just to get a stretch

and to clear your minds and to take a break, I think it's important and good for everyone to have that opportunity.

Now, those of you who are in the gallery and not sitting in the jury box, any one of you could be selected as a juror in this case. So the instruction I am about to give applies to you as well as to you folks in the jury box. And you will hear me give this instruction repeatedly if you sit on this jury.

You don't know anything about the case other than what you have heard this morning, and so it would be very inappropriate to form any opinions; to have any conclusions

[p. 64]

at all about the case. And so this is a kind of recess instruction that you will hear regularly during the course of the case, but it applies to you now. Everyone has taken the oath to participate in jury selection and to fairly answer these questions. So during this recess, you must not discuss this case with anyone, including other jurors. You cannot talk to members of your family, people involved in this trial, or anyone else. If anyone tries to talk to you about this case during this recess, please let me know about it immediately. I know that many of you use cell phones, e-mail, I-phones, text messaging, Twitter, Blackberries, the Internet, and other tools of technology including social networking tools like Facebook, MySpace, U-Tube. You must not talk to anyone about the case or use any of these tools of technology to communicate electronically with anyone else during this recess. Do not read, watch, or listen to any media or information during our

break. Do not conduct any research about the case or anything that you heard so far. And please keep an open mind until all the evidence has been received and you have heard the views of your fellow jurors, if you are selected as a juror in the case.

So at this point we will take a 10-minute recess. And during that time make yourselves comfortable. And again, please do not discuss the case with anyone in any

* * *

[p. 77]

MR. BEARDSLEY: Mr. Knapp, can you do that, too? Were you nodding?

MR. KNAPP: Yes.

MR. BEARDSLEY: Thank you. There's a natural sympathy when somebody gets hurt. And we are not here about sympathy, we are here about fair compensation and so that needs to be understood. Mr. Warger is a fighter; he's fighting a comeback. And is everyone comfortable we are not awarding damages because of sympathy, we are awarding damages because of fair compensation that's required. Everyone is kind of nodding with me on that?

Ladies and gentlemen, I know you are going to find this hard to believe, but I can stand up here all day and ask you questions. Here is the bottom line, then I am going to sit down. The bottom line is is there anything that's come up, is there any topic that you thought of since we started, other than the one we talked about, that you now have concluded, you know, I don't think

I could be a fair and impartial juror on this kind of case. I know it's kind of a general question, but this is your time to raise your hand and say, "I just don't think I can do this." Other than what we have talked about, anybody here have anything that you are sitting here going, "Geez, I just don't think I could be fair"? Thank you. Thank you very much.

[p. 78]

Your Honor, I would pass this jury for cause.

THE COURT: Very well, Mr. Beardsley. Mr. Kappelman, are you conducting voir dire?

MR. KAPPELMAN: Yes, Your Honor.

THE COURT: You may begin, sir.

VOIR DIRE EXAMINATION

MR. KAPPELMAN: Good morning, ladies and gentlemen. I am Ron Kappelman. I was previously introduced to you. I want to thank you very much for being here and for being willing to take the amount of time that's necessary to decide this. You have heard a little bit about this. This lawsuit involves an accident that happened up on the intersection of Highway 385 and Sheridan Lake Road and happened on August 4, 2006. My client, Mr. Shauers, was driving a pickup pulling a 28-foot travel trailer. He was going south on Highway 385. Mr. Warger was driving a Harley Davidson motorcycle; he was making a left turn from Sheridan Lake Road on to 385. Then he was going to turn back on to 385 --excuse me. He made a left-hand turn from Sheridan Lake Road on to 385, then he was going to turn right back on to Sheridan Lake Road

where he just pulled out from. Does any of that jog your memory about every hearing about an accident like that?

Each party -- that would be Mr. Warger and Mr. Shauers -- claims that the other person caused the

[p. 79]

accident. That is what your job is going to be here; that is why we are here is to determine what caused this accident. Does anybody not understand that that's what this lawsuit is about, at this point?

Mr. Beardsley talked a lot about the damages, a lot about prosthetic legs; but do you all understand that this case is about who caused this accident? Is there anybody here that would have any problem in rendering a decision about who caused the accident?

Mr. Beardsley asked you if you'd have a problem in returning a verdict for a substantial sum of money for Mr. Warger, and most of you said I wouldn't be adverse to that. But on the other hand, I want to ask this question: if you determined Mr. Warger caused the accident, not my client, Randy Shauers, if you determined that Mr. Warger caused the accident by pulling on to 385 as Randy was coming down the highway and that Mr. Warger failed to yield for Randy Shauers and caused the accident, would any of you have a problem in finding for my client, Randy Shauers, in telling Mr. Warger he's not entitled to any damages? Ms. Abdo, how do you feel about that? Let me explain before I start asking you all this particular question.

Lawsuits are in two phases. Okay. First of all, there's the issue of liability; who caused the accident. All right. You never get to how much a person gets for

[p. 80]

damages until you answer the first question: who caused the accident? So in this particular case, the largest and greatest issue for you to decide is who caused the accident, and if you decide Mr. Shauers did not cause the accident, it was caused by Mr. Warger, then you never get to how much money the man gets, so we never get to the idea of pain and suffering, loss of enjoyment of life, future medical expenses, past medical expenses. Do you understand that, Ms. Abdo, that that's what's going on here and do you have a problem with that?

MS. ABDO: No, I don't.

MR. KAPPELMAN: Would you, first of all, make Mr. Warger prove that Mr. Shauers actually caused the accident before you are going to make a jump to: I am going to give Mr. Warger money. Would you make him prove that Randy Shauers, my client, actually caused the accident before you make the jump to: I am going to talk about money? And obviously that's very important in this case. Do you see what I am saying? One could assume for Mr. Beardsley's examination, and we are not even talking about who caused the accident, but we are talking about who caused the accident; that's why we are here. We are not arguing Mr. Warger didn't lose his leg; that's obvious; he did lose his leg. He had serious injuries. We are not here to argue about that. We are here to argue about and

* * *

REPLY BRIEF

No. 13-517

In the Supreme Court of the United States

GREGORY P. WARGER, PETITIONER

v.

RANDY D. SHAUERS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

STEVEN C. BEARDSLEY
GARY D. JENSEN
BEARDSLEY, JENSEN & VON WALD, P.L.L.C.
4200 Beach Drive, Suite 3
P.O. Box 9579
Rapid City, SD 57709

KANNON K. SHANMUGAM
Counsel of Record
JAMES M. MCDONALD
ELI SAVIT
WILLIAMS & CONNOLLY LLP
725 Twelfth Street, N.W.
Washington, DC 20005
(202) 434-5000
kshanmugam@wc.com

TABLE OF AUTHORITIES

Page

Cases:

Hard v. *Burlington Northern Railroad*, 812 F.2d 482 (9th Cir. 1987) 2, 3

Lebron v. *National Railroad Passenger Corp.*, 513 U.S. 374 (1995) 5

Maldonado v. *Missouri Pacific Railway Co.*, 798 F.2d 764 (5th Cir. 1986), cert. denied, 480 U.S. 932 (1987) 3

McDonough Power Equipment, Inc. v. *Greenwood*, 464 U.S. 548 (1984) 6, 7, 9, 10

United States v. *Benally*, 546 F.3d 1230 (10th Cir. 2008), reh'g denied, 560 F.3d 1151 (10th Cir. 2009), cert. denied, 558 U.S. 1051 (2009), and 132 S. Ct. 401 (2011) 3, 7

United States v. *Boney*, 68 F.3d 497 (D.C. Cir. 1995) 3

United States v. *Henley*, 238 F.3d 1111 (9th Cir. 2001) 2, 3

United States v. *Peterson*, 483 F.2d 1222 (D.C. Cir. 1973) 9

Williams v. *Price*, 343 F.3d 223 (3d Cir. 2003) 3

Rules:

Fed. R. Evid. 606(b) ..... *passim*

Fed. R. Evid. 606(b)(1) 4

Fed. R. Evid. 606(b)(2) 4

Miscellaneous:

Stephen M. Shapiro et al., *Supreme Court Practice* (10th ed. 2013) 4

In the Supreme Court of the United States

No. 13-517

GREGORY P. WARGER, PETITIONER

v.

RANDY D. SHAUERS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

In his brief in opposition, respondent does not dispute, and indeed concedes, that there is a circuit conflict on the question presented: namely, whether, under Federal Rule of Evidence 606(b), a party moving for a new trial based on juror dishonesty during voir dire may introduce juror testimony about statements made during deliberations that tend to show the alleged dishonesty. See Br. in Opp. 4-5. Respondent also does not dispute, and indeed concedes, that the question presented is of substantial importance and thus may warrant the Court's review in an appropriate case. See *id.* at 16.

Respondent instead offers a smattering of reasons why the Court should not grant review on that question here. But none of those reasons is even colorable. Indeed, respondent made many of the same arguments be-

fore the lower courts—and those courts evidently, and correctly, rejected them in proceeding to consider and answer the question presented. Particularly in the wake of the lower courts' decisions, there is no valid impediment to the Court's doing the same, and thereby resolving a mature and widely recognized circuit conflict on an important question of interpretation involving a federal rule. Because this case readily satisfies the criteria for further review, the petition for certiorari should be granted.

1. Respondent concedes that "there is a recognized split among the circuits * * * on the admissibility of juror testimony about statements made during deliberations that tend to show juror dishonesty during voir dire." Br. in Opp. 4-5. Respondent nevertheless contends that this case does not implicate the circuit conflict because the asserted juror dishonesty at issue here occurred in response to "general, nonspecific questions" at voir dire, rather than "specific, material questions." *Id.* at 5; see *id.* at 4-12. That contention is completely unfounded; there is no support for respondent's superficial and illogical distinction.

a. As an initial matter, none of the cases that give rise to the circuit conflict supports respondent's proffered distinction. Instead, those cases uniformly address the broader question whether "[s]tatements which tend to show deceit during voir dire are * * * barred by [Rule 606(b)]"—without regard to whether the "deceit" at issue occurred in response to general or specific questions. *Hard* v. *Burlington Northern R.R.*, 812 F.2d 482, 485 (9th Cir. 1987). The Ninth and District of Columbia Circuits have held that such statements are not excluded under Rule 606(b), and the Fifth Circuit has indicated in dicta that it would follow the same rule. See *ibid.*; *United States* v. *Henley*, 238 F.3d 1111, 1121 (9th Cir. 2001);

United States v. *Boney*, 68 F.3d 497, 503 (D.C. Cir. 1995); *Maldonado* v. *Missouri Pacific Railway Co.*, 798 F.2d 764, 770 (5th Cir. 1986), cert. denied, 480 U.S. 932 (1987). By contrast, the Tenth Circuit, now joined by the Eighth Circuit in the decision below, has held that such statements are inadmissible under Rule 606(b), and the Third Circuit has suggested in dicta it would reach the same result. See *United States* v. *Benally*, 546 F.3d 1230, 1236-1238 (10th Cir. 2008), cert. denied, 558 U.S. 1051 (2009), and 132 S. Ct. 401 (2011); Pet. App. 6a-10a; *Williams* v. *Price*, 343 F.3d 223, 235 n.5 (3d Cir. 2003) (Alito, then-J.).

To be sure, some of those cases involved answers to more "specific" questions, and others answers to more "general" ones. See Br. in Opp. 11 (conceding that *Maldonado*, "the case that the Ninth Circuit relied on in *Hard* and *Henley*," involved a "nonspecific question"). But it could just as easily be said that some of those cases were decided on Mondays and others on Fridays. Nothing in any of those cases could even arguably be read to support the distinction that respondent seeks to draw between "general" and "specific" questions at voir dire.

Notably, in the decisions below, neither the court of appeals nor the district court gave any credence to respondent's proffered distinction. To the contrary, while ultimately ruling in respondent's favor, both courts expressly recognized the existence of a circuit conflict on the admissibility of juror testimony about statements made during deliberations that tend to show juror dishonesty during voir dire—with the clear implication that petitioner would have prevailed under the conflicting view. See Pet. App. 8a, 37a-38a. The courts below simply disagreed with the legal conclusions of the conflicting decisions, siding with the Tenth Circuit (and dicta from

the Third Circuit) in holding that Rule 606(b) does not permit a party moving for a new trial to introduce such juror testimony. See *ibid.* This case therefore involves precisely the sort of conflict that warrants the Court's review. See Stephen M. Shapiro et al., *Supreme Court Practice* § 6.31(a), at 479-480 (10th ed. 2013) (explaining that "[c]ases are properly regarded as conflicting if it can be said with confidence that another circuit would decide the case differently" if presented with the same facts, and noting that "the best 'evidence' of a genuine conflict" is when "the lower courts have expressly acknowledged the conflict").

b. Nor can respondent point to anything in the text of Rule 606(b)—or in any other authority, for that matter—to support his proffered distinction. By its terms, Rule 606(b)(1) precludes the use of juror testimony "[d]uring an inquiry into the validity of a verdict." The question that has divided the courts of appeals is whether, in the context of a motion for new trial, statements that tend to show juror dishonesty during voir dire are statements made "[d]uring an inquiry into the validity of a verdict" (and, if so, whether they may nevertheless be admitted under the exception in Rule 606(b)(2) for evidence that "extraneous prejudicial information was improperly brought to the jury's attention"). That inquiry has nothing to do with the form that the questioning at voir dire took. And there is nothing in the text of Rule 606(b) to support the bizarre view that statements that tend to show juror dishonesty during voir dire are admissible to support a motion for new trial when the dishonesty involves responses to specific questions, but not when it involves responses to general ones.

2. Respondent contends, in passing, that the question presented is not properly before the Court in this case because petitioner "has never alleged until now that

Juror Whipple was dishonest" during voir dire. Br. in Opp. 10; see *id.* at 3 n.2, 14. To begin with, respondent entirely ignores the familiar rule that this Court will consider an issue as long as it has been *either* pressed *or* passed upon below. See, *e.g.*, *Lebron* v. *National R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995). Respondent does not dispute that both the court of appeals and the district court squarely addressed the question presented. See Pet. App. 6a-10a, 31a-38a.

For purposes of this Court's decision whether to grant review, that should be the end of the matter. But notably, both lower courts specifically acknowledged that they were addressing the question presented in response to petitioner's argument that he was entitled to a new trial because Ms. Whipple had been dishonest during voir dire. See, *e.g.*, Pet. App. 8a (statement by the court of appeals that "[petitioner] argues Rule 606(b) should not exclude the affidavit because it is * * * being used * * * to show a juror was dishonest during voir dire"); *id.* at 35a (statement by the district court that "[petitioner] also seeks to use the affidavit of Mr. Titus to demonstrate the foreperson lied during voir dire"). Those courts were correct—and respondent is incorrect—in their characterization of the argument that petitioner was advancing; in his briefs below, petitioner highlighted in detail Ms. Whipple's deceitful responses to questions at voir dire. See Pet. C.A. Br. 32; Br. in Opp. App. 14.

While respondent contends before this Court that petitioner "has never alleged until now that Juror Whipple was dishonest" during voir dire, respondent clearly felt otherwise before the lower courts, because he expressly responded to that argument in his briefs below. Specifically, respondent argued in both courts, as he does here, that "[petitioner's] claim that Ms. Whipple failed to disclose the experience that she had with her daughter dur-

ing *voir dire*" should fail because "[t]here is no evidence that any juror deliberately concealed information or purposely gave incorrect responses" and "[n]one of the questions asked during *voir dire* put the juror on notice that a particular answer was required." Resp. C.A. Br. 26-27; Mem. in Opp. to Mot. for New Trial 10, D. Ct. Dkt. 180 (Nov. 12, 2010). Respondent also argued that, "[r]egardless of how [petitioner] hopes to use the juror statements at issue, Rule 606(b) bars their admission unless the statements fall within one of the enumerated exceptions to Rule 606(b), which they do not." Resp. C.A. Br. 27; see Mem. in Opp. to Mot. for New Trial 8-9. Of course, that is precisely the legal question that the lower courts squarely addressed—and on which petitioner is seeking this Court's review.

3. Respondent next contends that this Court should deny review because petitioner has "waived his right to an evidentiary hearing." Br. in Opp. 14; *id.* at 14-16. That is an odd contention. Petitioner moved for a new trial based on Mr. Titus's affidavit detailing Ms. Whipple's dishonesty during voir dire. See Pet. App. 40a-41a. The district court denied petitioner's motion because it held that Rule 606(b) "bars [the] admission" of Mr. Titus's affidavit. *Id.* at 38a. The district court correctly explained that, under *McDonough Power Equipment, Inc.* v. *Greenwood*, 464 U.S. 548 (1984), a party is entitled to a new trial based on juror dishonesty during voir dire only if "[the] party presents *admissible* evidence of juror bias." Pet. App. 29a. Because its holding that Mr. Titus's affidavit was inadmissible under Rule 606(b) indisputably left petitioner with no admissible evidence of Ms. Whipple's dishonesty during voir dire, the district court denied petitioner's motion for a new trial. *Id.* at 38a.

Petitioner's position is that Mr. Titus's affidavit, standing alone, is sufficient to entitle him to a new trial:

namely, because it demonstrates that "a juror failed to answer honestly a material question on *voir dire*" and that "a correct response would have provided a valid basis for a challenge for cause," as *McDonough* requires. See 464 U.S. at 556. As respondent concedes, see Br. in Opp. 16, a district court need not hold an evidentiary hearing in order to determine whether the *McDonough* standard has been satisfied.

The question before this Court, however, is not whether Mr. Titus's affidavit is sufficient to meet the *McDonough* standard; it is the threshold legal question whether Rule 606(b) permits the introduction of juror testimony of the type at issue here. Should the Court agree with petitioner on that question, respondent would be free to argue on remand that Mr. Titus's affidavit is insufficient to meet the *McDonough* standard. And if the district court on remand were to conclude that Mr. Titus's affidavit were substantial evidence of juror misconduct, but insufficient standing alone to meet the *McDonough* standard, it would plainly have the discretion to order an evidentiary hearing. See *McDonough*, 464 U.S. at 556. In any event, those are issues for another day; they have no bearing on this Court's ability to consider and resolve the question presented here.

4. Finally, respondent contends that, "[w]hile the question presented is one that may warrant the Court's review at some point, this case is not an optimal vehicle for consideration and resolution of the question." Br. in Opp. 16; see *id.* at 16-20. As a preliminary matter, respondent does not dispute that this case presents a vastly superior vehicle to *Benally*, the only recent case in which the Court has had the opportunity to consider the question presented. See Pet. 17-19. To the extent that respondent suggests that this case suffers from vehicle problems of its own, that suggestion lacks merit.

a. As he did below, respondent contends that Ms. Whipple answered the "general" questions at voir dire truthfully—or, at a minimum, that there is no evidence that the answers were intentionally dishonest. See, *e.g.*, Br. in Opp. 18; see *id.* at 11, 14-15. Again, however, the decisions below provide a complete answer to that contention: both courts operated on the premise that Ms. Whipple's statements made during deliberations, as recorded in Mr. Titus's affidavit, tended to show dishonesty. See, *e.g.*, Pet. App. 8a, 35a. And as noted above, they did so in the face of respondent's assertions that "[t]here is no evidence that any juror deliberately concealed information or purposely gave incorrect responses" and "[n]one of the questions asked during *voir dire* put the juror on notice that a particular answer was required." See pp. 5-6, *supra*.

In any event, it verges on the frivolous to suggest that a juror who was plainly unwilling to award *any* damages to petitioner based on her daughter's own involvement in a fatal automobile accident, see Pet. App. 40a, answered truthfully when she was asked whether there was any reason why she could not remain fair and impartial—much less when she was specifically asked whether she could vote to award damages for future medical expenses or pain and suffering if the evidence supported such an award. See Tr. 52-61, 77, D. Ct. Dkt. 197 (Sept. 20, 2010). There is no conceivable "meaning Juror Whipple [could have] attributed to" those questions that would render her answers truthful. Br. in Opp. 18. And to the extent respondent maintains that Mr. Titus's affidavit is insufficient to demonstrate that "a juror failed to answer honestly a material question on *voir dire*," respondent would be free to renew that argument on remand, in the event this Court holds that

Rule 606(b) permits the introduction of juror testimony of the type at issue here. See p. 7, *supra*.

b. Respondent next contends that, "[i]f [p]etitioner was interested in" whether the jurors "or a close family member or friend had been involved in an accident," his counsel "had an obligation to ask more probing questions during voir dire to ferret out this type of sensitive and specific information." Br. in Opp. 18. Once again, however, the lower courts addressed the question presented without in any way suggesting that petitioner's counsel somehow had an obligation to ask Ms. Whipple more specific questions. See, *e.g.*, Pet. App. 8a, 35a. And in any event, respondent's contention lacks merit, because the questioning that took place here, however "general" or "specific," "should have elicited instances of bias, if any at all existed, on the part of the [potential jurors]." *United States* v. *Peterson*, 483 F.2d 1222, 1226 (D.C. Cir. 1973). Here, there can be no real dispute that the questioning should have exposed Ms. Whipple's bias based on her daughter's own involvement in a fatal automobile accident—if, that is, she had answered those questions truthfully.

c. Most curious of all, respondent contends that "the proper time to discover" juror dishonesty is "when the jury is selected and peremptory challenges are available to the attorney." Br. in Opp. 19 (citation omitted). But petitioner's counsel would have had no basis to challenge Ms. Whipple (whether peremptorily or for cause), precisely because her answers during voir dire were dishonest; that dishonesty became apparent only when Mr. Titus came forward after trial. The whole point of *McDonough* is that it provides a mechanism for a party to obtain a new trial when evidence of juror dishonesty comes to light only after the fact. The court of appeals erred when it affirmed the denial of a new trial on the

ground that the evidence of dishonesty at issue here is excluded by Rule 606(b). In light of the mature and widely recognized circuit conflict on that issue, the court of appeals' decision warrants this Court's review.

* * * * *

The petition for a writ of certiorari should be granted.

Respectfully submitted.

STEVEN C. BEARDSLEY
GARY D. JENSEN
BEARDSLEY, JENSEN & VON WALD, P.L.L.C.
4200 Beach Drive, Suite 3
P.O. Box 9579
Rapid City, SD 57709

KANNON K. SHANMUGAM
JAMES M. MCDONALD
ELI SAVIT
WILLIAMS & CONNOLLY LLP
725 Twelfth Street, N.W.
Washington, DC 20005
(202) 434-5000
kshanmugam@wc.com

JANUARY 2014

JOINT APPENDIX

No. 13-517

In the Supreme Court of the United States

GREGORY P. WARGER, PETITIONER

v.

RANDY D. SHAUERS

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

JOINT APPENDIX

KANNON K. SHANMUGAM
WILLIAMS & CONNOLLY LLP
725 Twelfth Street, N.W.
Washington, DC 20005
(202) 434-5000

Counsel of Record
for Petitioner

RONALD R. KAPPELMAN
BANKS, JOHNSON,
KAPPELMAN & BECKER,
PLLC
731 St. Joseph Street
Rapid City, SD 57709
(605) 341-2400

Counsel of Record
for Respondent

TABLE OF CONTENTS

Appendix A:	Court of appeals docket entries	1
Appendix B:	District court docket entries	7
Appendix C:	Complaint, Dec. 12, 2008 (D. Ct. Dkt. 1)	14
Appendix D:	Preliminary jury instruction, Sept. 20, 2010 (D. Ct. Dkt. 149)	19
Appendix E:	Response to jury questions, Sept. 29, 2010 (D. Ct. Dkt. 157)	21
Appendix F:	Final jury instructions, Sept. 29, 2010 (D. Ct. Dkt. 160)	23
Appendix G:	Transcript of jury trial, voir dire examination of the jury, Sept. 20, 2010 (D. Ct. Dkt. 197)	32

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 12-1846

GREGORY P. WARGER, Plaintiff-Appellant

v.

RANDY D. SHAUERS, Defendant-Appellee

DOCKET ENTRIES

DATE	PROCEEDINGS
04/10/2012	Civil case docketed. [3899429] [12-1846] (CYZ)
04/10/2012	Originating court document filed consisting of notice of appeal, docket entries, judgment of 9/29/10, order of 3/28/12, [3899431] [12-1846] (CYZ)
	* * * * *
04/19/2012	Certificate of transcript filed by Appellant Mr. Gregory P. Warger. Transcript ordered [3903045] [12-1846] (TBJ)
04/19/2012	DESIGNATION of record filed by Appellant Mr. Gregory P. Warger.

w/service 04/19/2012 [3903048] [12-1846] (TBJ)

04/19/2012 METHOD of appendix preparation filed by Appellant Mr. Gregory P. Warger Separate Appendix w/service 04/19/2012 [3903049] [12-1846] (TBJ)

04/19/2012 STATEMENT of issues filed by Appellant Mr. Gregory P. Warger w/service 04/19/2012 [3903050] [12-1846] (TBJ)

* * * * *

10/11/2012 RECORD FILED - TRANSCRIPT, 1 volumes, Location STP, Comments: D.C. Doc. #197, Source Location: DC, Dt. of Proceeding/Hearing: 09/20/2010, No. of Pgs.: 165, Type of Proceeding: Voir Dire, Court Reporter: Thompson, Judith Marie; TRIAL TRANSCRIPT, 7 volumes, Location STP, Comments: D.C. Doc. 198 through 204, Source Location: DC, Dt. of Proceeding/Hearing: 09/20/2010 through 09/27/2010, No. of Pgs.: 1588, Court Reporter: Thompson, Judith Marie; TRANSCRIPT, 1 volumes, Location STP, Comments: D.C. Doc. #206, Source Location: DC, Dt. of Proceeding/Hearing: 09/13/2010, No. of Pgs.: 57, Type of Proceeding: pre-

trial conference, Court Reporter: Thompson, Judith Marie; TRANSCRIPT, 1 volumes, Location STP, Comments: D.C. Doc. #208, Source Location: DC, Dt. of Proceeding/Hearing: 07/16/2010, No. of Pgs.: 119, Type of Proceeding: pretrial conference, Court Reporter: Thompson, Judith Marie; TRANSCRIPT, 1 volumes, Location STP, Comments: D.C. Doc. #210, Source Location: DC, Dt. of Proceeding/Hearing: 07/14/2010, No. of Pgs.: 96, Type of Proceeding: pretrial conference, Court Reporter: Thompson, Judith Marie [3962579] [12-1846] (CYZ)

10/16/2012 RECORD FILED EXHIBITS, Location STP, Comments: two 3-ring binders plaintiff's jury trial exhibits w/defendant's exhibits (in pocket of Vol. I), Source Location: USDC [3964471] [12-1846] (JMM)

* * * * *

10/25/2012 BRIEF FILED - APPELLANT BRIEF filed by Mr. Gregory P Warger. w/service 10/24/2012, Length: 10,541 words 10 COPIES OF PAPER BRIEFS FROM Gregory P. Warger due 10/30/2012 WITH revised certificate of service for paper briefs.. Brief of Randy D. Shauers due on 11/26/2012

[3967506] [12-1846] (MER)

10/26/2012 Paper copies Appellant/Petitioner Brief, [3967506-2] filed by Mr. Gregory P Warger. 10 paper copies received. w/Addendum attached [3968282] [12-1846] (MER)

10/26/2012 RECORD FILED - APLNT/PET APPENDIX, 1 volume, Location STL, Comments: 3 copies [3968283] [12-1846] (MER)

* * * * *

12/18/2012 BRIEF FILED - APPELLEE BRIEF filed by Mr. Randy D. Shauers, w/service 12/17/2012, Length: 30 pages 7,179 words 10 COPIES OF PAPER BRIEFS FROM Randy D. Shauers due 12/26/2012 WITH revised certificate of service for paper briefs. Reply brief of Gregory P. Warger due on 01/02/2013. [3985967] [12-1846] (MER)

* * * * *

12/26/2012 Paper copies Appellee/Respondent brief, [3985967-2] filed by Mr. Randy D. Shauers. 10 paper copies received. [3988477] [12-1846] (MER)

* * * * *

01/10/2013	BRIEF FILED APPELLANT REPLY BRIEF filed by Mr. Gregory P. Warger. w/service 01/09/2013, Length: 2,596 words 10 COPIES OF PAPER BRIEFS FROM Gregory P. Warger due 01/15/2013 WITH revised certificate of service for paper briefs [3993317] [12-1846] (MER)
01/15/2013	Paper copies Reply brief, [3993317-2] filed by Mr. Gregory P. Warger. 10 paper copies received. [3994990] [12-1846] (MER)

* * * * *

03/12/2013	ARGUED & SUBMITTED in St. Paul to Judges Roger L. Wollman, Kermit E. Bye, Steven M. Colloton on 03/12/2013 Mr. Gary D. Jensen for Appellant Mr. Gregory P. Warger and Mr. Ronald Kappelman for Appellee Mr. Randy D. Shauers. Rebuttal by Mr. Gary D. Jensen for Mr. Gregory P. Warger RECORDED [4013866] [12-1846] (CYZ)
07/24/2013	OPINION FILED - THE COURT: Roger L. Wollman, Kermit E. Bye and Steven M. Colloton AUTHORING JUDGE: Kermit E. Bye (PUBLISHED) [4057878] [12-1846] (MER)

07/24/2013	JUDGMENT FILED - The judgment of the Originating Court is AFFIRMED in accordance with the opinion. ROGER L. WOLLMAN, KERMIT E. BYE and STEVEN M. COLLOTON Hrg Mar 2013 [4057881] [12-1846] (MER)

* * * * *

08/14/2013	MANDATE ISSUED. [4064849] [12-1846] (MER)

* * * * *

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

No. 08-5092-JLV

GREGORY P. WARGER, Plaintiff

v.

RANDY D. SHAUERS, Defendant

DOCKET ENTRIES

DATE	#	PROCEEDING
12/12/2008	1	COMPLAINT with Jury Demand, filed by Gregory P. Warger. (BBH) (Entered: 12/12/2008)
		* * * * *
01/09/2009	6	ANSWER and Demand for Jury Trial to 1 Complaint by Randy D. Shauers. (JLH) (Entered: 01/09/2009)
		* * * * *
01/23/2009	8	AMENDED ANSWER to 1 Complaint and COUNTERCLAIM against Gregory P. Warger by Randy D. Shauers. (JLH) (Entered:

01/23/2009)

* * * * *

7/22/2010	104	ORDER GRANTING ORAL MOTION FOR MISTRIAL. Signed by U. S. District Judge Jeffrey L. Viken on 7/22/10. (SB) (Entered: 07/22/2010)
7/20/2010	105	Jury Trial completed on 7/22/2010 (mistrial declared) before U. S. District Judge Jeffrey L. Viken (Court Reporter Judy Thompso[illegible] (BBH) (Entered: 07/22/2010)

* * * * *

09/20/2010	147	Voir Dire held on 9/20/2010 before U. S. District Judge Jeffrey L. Viken (Court Reporter Judy Thompson) (JLH) (Entered: 09/20/2010)
09/20/2010		Jury Trial began on 9/20/2010 before U. S. District Judge Jeffrey L. Viken (Court Reporter Judy Thompson) (JLH) (Entered: 09/20/2010)
09/20/2010	149	PRELIMINARY Instructions to the Jury. (JLH) Modified on 9/20/2010 (JLH). (JLH). (Entered: 09/20/2010)

* * * * *

09/29/2010		Jury Trial completed on 9/29/2010 before U. S. District Judge Jeffrey

		L. Viken (Court Reporter Judy Thompson) (JLH) (Entered: 09/29/2010)
		* * * * *
09/29/2010	156	JURY Question "Is finding Warger's negligence is greater than slight is that the same as finding a verdict for the defendant?" and "How would you communicate that?" (JLH) (Entered: 09/29/2010)
09/29/2010	157	RESPONSE to 156 Jury Question stating "Please review instructions No. 9 Definition of Contributory Negligence and Comparative Negligence and No. 24 Issues to be Decided. Consider these instructions along with all the instructions as a whole and continue your deliberations" and "Please follow the procedure described in Instruction No. 27." (JLH) (Entered: 09/29/2010)
09/29/2010	158	JURY Question "We have a verdict." (JLH) (Entered: 09/29/2010)
09/29/2010	159	VERDICT in favor of the Defendant, Randy D. Shauers and against the Plaintiff, Gregory P Warger. (JLH) (Entered: 09/29/2010)
09/29/2010	160	Final Instructions to the Jury. (JLH) (Entered: 09/29/2010)
		* * * * *

09/29/2010	162	JUDGMENT in favor of the Defendant, Randy D. Shauers and against the Plaintiff, Gregory P. Warger. The clerk shall assess costs against the plaintiff and in favor of the defendant. Signed by U. S. District Judge Jeffrey L. Viken on September 29, 2010. (JLH) (Entered: 09/29/2010)

* * * * *

10/04/2010	165	RESPONSE to 144 Supplement *Defendant's Memorandum in Opposition to Plaintiff's Supplemental Affidavit of Attorney's Fees and Costs* filed by All Defendants. (Strommen, Gregory) (Entered: 10/04/2010)

* * * * *

10/13/2010	167	Hearing on Plaintiff's Supplemental Affidavit re: Motion for Costs and Fees held on 10/13/2010 before U.S. District Judge Jeffrey L. Viken (Court Reporter Judy Thompson) (BBH) (Entered: 10/13/2010)

* * * * *

10/25/2010	170	MOTION for Judgment as a Matter of Law *or New Trial* by Gregory P. Warger. (Jones, Travis) (Entered: 10/25/2010)
10/25/2010	171	MEMORANDUM in Support re 170 MOTION for Judgment as a

		Matter of Law *or New Trial* filed by Gregory P. Warger. (Attachments: # 1 Exhibit Affidavit of Stacey Titus)(Jones, Travis) (Entered: 10/25/2010)
		* * * * *
11/12/2010	180	MEMORANDUM in Opposition re 170 MOTION for Judgment as a Matter of Law *or New Trial Defendant's Brief in Opposition to Plaintiff's Motion for Judgment As a Matter of Law or New Trial* filed by Randy D. Shauers. (Strommen, Gregory) (Entered: 11/12/2010)
		* * * * *
11/29/2010	182	REPLY to Motion Response re 170 MOTION for Judgment as a Matter of Law *or New Trial* filed by Gregory P. Warger. (Jones, Travis) (Entered: 11/29/2010)
		* * * * *
03/28/2012	190	ORDER denying 170 Motion for Judgment as a Matter of Law. Signed by U. S. District Judge Jeffrey L. Viken on 3/28/12. (Attachments: # 1 Exhibit A - Transcript) (SB) (Entered: 03/28/2012)
04/09/2012	191	NOTICE OF APPEAL as to 162 Judgment, 190 Order on Motion for Judgment as a Matter of Law (paid $455 Appellate Filing fee; receipt

number 0869-1398943) by Gregory P. Warger. (Attachments: # 1 Appellant's Form A, # 2 Appellee's Form B)(Jones, Travis) (Entered: 04/09/2012)

* * * * *

08/30/2012	197	TRANSCRIPT of Proceedings re 147 Voir Dire held on September 20, 2010 before Judge Jeffrey L. Viken. Court Reporter/Transcriber: Judith M. Thompson, Telephone number 605–348–8610. Transcript may be viewed at the Clerk's Office public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Redaction Request due 9/24/2012. Redacted Transcript Deadline set for 10/4/2012. Release of Transcript Restriction set for 12/3/2012. (JT) (Entered: 08/30/2012)

* * * * *

07/24/2013	214	OPINION of USCA as to 191 Notice of Appeal, filed by Gregory P. Warger (TAL) (Entered: 07/24/2013)
07/24/2013	215	JUDGMENT of USCA affirming the judgment of the District Court as to 191 Notice of Appeal, filed by

		Gregory P. Warger (TAL) (Entered: 07/24/2013)
		* * * * *
08/14/2013	217	MANDATE from 8th Circuit COA affirming the decision of the District Court as to 191 Notice of Appeal, filed by Gregory P. Warger (TAL) (Entered: 08/14/2013)
		* * * * *

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

No. 08-5092-JLV

GREGORY P. WARGER, Plaintiff

v.

RANDY D. SHAUERS, Defendant

COMPLAINT AND JURY DEMAND

Parties

1. Plaintiff Gregory P. Warger ("Warger") is a resident of St. Louis, Missouri.

2. Defendant Randy D. Shauers ("Shauers") is a resident of North Logan, Utah.

Jurisdiction

3. This Court has diversity jurisdiction pursuant to 28 U.S.C. § 1332 based on the parties' citizenship and the fact the amount in controversy exceeds $75,000.

Venue

4. Venue is properly laid within the District of South Dakota pursuant to 29 U.S.C. § 1391(b) because at all

times material hereto the event causing Plaintiff's injuries occurred within the District of South Dakota.

Facts

5. On August 4, 2006, at the time of this accident, Warger was operating a 2001 Harley Davidson motorcycle southbound on U.S. Highway 385 in Pennington County, South Dakota.

6. As the same time Defendant Shauers was operating a 2002 Chevy three-quarter ton pickup pulling a 28 foot long 2000 Forest River camper trailer.

7. While traveling southbound on U.S. Highway 385 Shauers negligently, carelessly and with reckless disregard caused his pickup truck and trailer to collide into Warger and Warger's motorcycle.

Count 1 - Negligence:

8. Shauers' negligence includes, but is not limited to:

(a) failing to keep a proper lookout;

(b) failing to yield;

(c) failing to have the truck and trailer under such control that it could be readily and reasonably stopped;

(d) failing to honk when he knew a collision would occur;

(e) passing in a no passing zone;

(f) passing in an intersection.

9. As a direct result of Shauers' negligence, Warger sustained serious injuries and damages, including but not limited to:

(a) numerous fractures;

(b) extensive soft tissue injuries;

(c) physical and mental pain and suffering; and

(d) loss of Warger's lower left leg.

All of which required substantial medical care and have resulted in permanent disability.

10. As a further direct and proximate result of the aforementioned accident and injuries, Warger has suffered a loss of income and incurred expenses for medical care, hospitalization, rehabilitation, doctors, nurses, laboratory tests, medical equipment, prosthetics, and other similar expenses for examination, treatment, and care in an amount greater than $300,000.00 and will incur further expenses in the future.

11. As a further direct and proximate result of the above, Warger has been permanently injured in his health and physical ability, and suffered a loss of enjoyment of life all in an amount to be proven at the time of trial.

WHEREFORE Warger prays for judgment against Shauers as follows:

1. For the expense of medical treatment, both present and future, including prejudgment interest;

2. For pain and suffering, both present and future; as well as the loss of enjoyment of life, and permanent disability;

3. For lost wages, both present and future, including prejudgment interest;

4. For damage to his 2001 Harley Davidson motorcycle; and

5. Such other and further relief as the Court may deem just and equitable in the premises.

Dated this 12th day of December, 2008.

BEARDSLEY, JENSEN & VON WALD, Prof. L.L.C.

By: /s/ _____

Travis B. Jones
Steven C. Beardsley
4200 Beach Drive, Suite 3
P.O. Box 9579
Rapid City, SD 57709
Telephone: (605) 721-2800
Facsimile: (605) 721-2801
Email: tjones@blackhillslaw.com
Attorneys for Plaintiff

DEMAND FOR JURY TRIAL

In accordance with Federal Rule of Civil Procedure 38(b), Plaintiff demands a jury trial of all his claims.

/s/
Travis B. Jones

APPENDIX D

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

No. 08-5092-JLV

GREGORY P. WARGER, Plaintiff

v.

RANDY D. SHAUERS, Defendant

PRELIMINARY JURY INSTRUCTION NO. 1—INTRODUCTION

Members of the jury, I shall take a few moments now to give you some initial instructions about this case and about your duties as jurors. At the end of the trial, I shall give you further instructions. I may also give you instructions during the trial. Unless I specifically tell you otherwise, all such instructions, both those I give you now and those I give you later, are equally binding on you and must be followed. Consider these instructions, together with all written and oral instructions given to you during or at the end of the trial, and apply them as a whole to the facts of the case.

This is a civil case. On August 4, 2006, in Pennington County, South Dakota, plaintiff Gregory P. Warger and defendant Randy D. Shauers were involved in a collision. Mr. Warger alleges he was injured in the collision and Mr. Shauers' negligence caused the collision. Mr.

Warger seeks damages for his injuries. Mr. Shauers denies that he was negligent and that his negligence, if any, caused the collision. Mr. Shauers affirmatively alleges that the collision was caused by the contributory negligence of Mr. Warger.

From the evidence, you will decide the facts. In weighing the evidence in this case, you have a right to consider the common knowledge possessed by all of you, together with the ordinary experiences and observations in your daily affairs of life. You may use reason and common sense to draw deductions or conclusions from facts which have been established by the evidence. You will then apply those facts to the law which I give you in these and in my other instructions, and in that way reach your verdict. You are the sole judges of the facts, but you must follow the law as stated in my instructions, whether you agree with it or not.

It is vital to the administration of justice that each of you as members of the jury faithfully perform your duties as jurors. You should carefully and honestly consider this case with due regard for the rights and interests of the respective parties. Neither sympathy nor prejudice should influence you. Your verdict must be based on evidence and not upon speculation, guess, or conjecture. The law demands of you a just verdict, unaffected by anything except the evidence, your common sense, and the law as I give it to you.

You should not take anything I say or do during the trial as indicating what I think of the evidence or what I think your verdict should be. Similarly, do not conclude from any ruling or other comment I make that I have any opinions on how you should decide the case.

APPENDIX E

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

No. 08-5092-JLV

GREGORY P. WARGER, Plaintiff

v.

RANDY D. SHAUERS, Defendant

RESPONSE TO JURY QUESTIONS

During deliberations, the jury asked the following questions:

QUESTION: "If finding Warger's negligence is greater than slight is that the same as finding a verdict for the defendant?"

ANSWER: Please review instructions No. 9 Definition of Contributory Negligence and Comparative Negligence and No. 24 Issues to be Decided. Consider these instructions along with all the instructions as a whole and continue your deliberations.

QUESTION: "How would you communicate that?"

ANSWER: Please follow the procedure described in Instruction No. 27.

Dated September 29, 2010.

BY THE COURT:

/s/

Jeffrey L. Viken
United States District Judge

APPENDIX F

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

No. 08-5092-JLV

GREGORY P. WARGER, Plaintiff

v.

RANDY D. SHAUERS, Defendant

FINAL JURY INSTRUCTIONS

FINAL INSTRUCTION NO. 1—INTRODUCTION

Members of the jury, I shall take a few moments now to give you the instructions that are to guide and govern you in arriving at a verdict. The law that applies to this case is contained in these instructions, and it is your duty to follow them. You must consider these instructions as a whole and not single out one instruction and disregard others. The order in which the instructions are given has no significance as to their relative importance. All instructions are equally binding on you and must be followed. Consider these instructions, together with all written and oral instructions given to you at the beginning and during the trial, and apply them as a whole to the facts of the case.

This is a civil case. On August 4, 2006, in Pennington County, South Dakota, plaintiff Gregory P. Warger and

defendant Randy D. Shauers were involved in a collision. Mr. Warger alleges he was injured in the collision and Mr. Shauers' negligence caused the collision. Mr. Warger seeks damages for his injuries. Mr. Shauers denies that he was negligent and that his negligence, if any, caused the collision. Mr. Shauers affiirmatively alleges that the collision was caused by the contributory negligence of Mr. Warger.

From the evidence, you will decide the facts. In weighing the evidence in this case, you have a right to consider the common knowledge possessed by all of you, together with the ordinary experiences and observations in your daily affairs of life. You may use reason and common sense to draw deductions or conclusions from facts which have been established by the evidence. You will then apply those facts to the law which I give you in these and in my other instructions, and in that way reach your verdict. You are the sole judges of the facts, but you must follow the law as stated in my instructions, whether you agree with it or not.

It is vital to the administration of justice that each of you as members of the jury faithfully perform your duties as jurors. You should carefully and honestly consider this case with due regard for the rights and interests of the respective parties. Neither sympathy nor prejudice should influence you. Your verdict must be based on evidence and not upon speculation, guess, or conjecture. The law demands of you a just verdict, unaffected by anything except the evidence, your common sense, and the law as I give it to you.

You should not take anything I said or did during the trial as indicating what I think of the evidence or what I think your verdict should be. Similarly, do not conclude

from any ruling or other comment I made that I have any opinions on how you should decide the case. By the language of these instructions, I do not intend to imply what any of the disputed facts in this case are or what your verdict in this case should be.

* * * * *

FINAL INSTRUCTION NO. 6—
BURDEN OF PROOF

In civil actions, the party who has the burden of proving an issue must prove that issue by the greater convincing force of the evidence.

Greater convincing force means that after weighing the evidence on both sides there is enough evidence to convince you that something is more likely true than not true. In the event the evidence is evenly balanced so that you are unable to say the evidence on either side of an issue has the greater convincing force, then your finding upon the issue must be against the party who has the burden of proving it. In this action, Mr. Warger has the burden of proving the following issues:

(1) that Mr. Shauers was negligent;

(2) that Mr. Shauers' negligence was a legal cause of Mr. Warger's insuries; and

(3) the amount, if any of Mr. Warger's damages that was legally caused by Mr. Shauers' negligence

Mr. Shauers has the burden of proving the following issue:

(1) that Mr. Warger was contributorily negligent.

In determining whether or not an issue has been proved by greater convincing force of the evidence, you should consider all of the evidence bearing upon that issue, regardless of who produced it.

* * * * *

FINAL INSTRUCTION NO. 9— DEFINITION OF CONTRIBUTORY NEGLIGENCE AND COMPARATIVE NEGLIGENCE

Contributory negligence is negligence on the part of a plaintiff which, when combined with the negligence of a defendant, contributes as a legal cause in the bringing about the injury to the plaintiff.

A plaintiff who is contributorily negligent may still recover damages if that contributory negligence is slight, or less than slight, when compared with the negligence of the defendant. The term "slight" means small when compared with the negligence of the defendant.

In deciding this issue you must determine the answer to two questions:

1. Whether both Mr. Warger and Mr. Shauers were negligent; and

2. If both were negligent, whether Mr. Warger's negligence was

   (a) "slight" or less than "slight," or

   (b) more than "slight" in comparison with Mr. Shauers' negligence.

In answering both parts to question #2, you must make a direct comparison between the conduct of Mr. Warger and Mr. Shauers.

If you find Mr. Warger's contributory negligence is more than slight when compared with the negligence of Mr. Shauers, then Mr. Warger is not entitled to recover any damages.

If you find Mr. Warger's contributory negligence is slight, or less than slight, when compared with the negligence of Mr. Shauers, then Mr. Warger is entitled to recover damages. However, Mr. Warger's damages must be reduced in proportion with the amount of his contributory negligence.

* * * * *

FINAL INSTRUCTION NO 24—
ISSUES TO BE DECIDED

The issues to be determined by you in this case are these:

First, was Mr. Shauers negligent?

If you find Mr. Shauers was not negligent, you will return a verdict for Mr. Shauers. If you find Mr. Shauers was negligent, you have a second issue to determine, namely:

Was that negligence a legal cause of any injury to Mr. Warger?

If you find Mr. Shauers' negligence was not a legal cause of Mr. Warger's injury, Mr. Warger is not entitled to recover and you will return a verdict for Mr. Shauers.

If you find Mr. Shauers' negligence was a legal cause of Mr. Warger's injury, you then must determine a third issue:

Was Mr. Warger also negligent?

If you find Mr. Warger was not negligent, you then must fix the amount of Mr. Warger's damages and return a verdict for Mr. Warger.

If you find Mr. Warger was also negligent, you then must determine a fourth issue, namely:

Was that negligence a legal cause of Mr. Warger's injury?

If you find that it was not a legal cause of Mr. Warger's injury, you then must fix the amount of Mr. Warger's damages and return a verdict for Mr. Warger.

If you find that Mr. Warger's negligence did contribute as a legal cause of his injury, Mr. Warger may still recover if the jury should find that such contributory negligence of Mr. Warger was slight in comparison with the negligence of Mr. Shauers. If you find that Mr. Warger is contributorily negligent, but that Mr. Warger's negligence is under the circumstances slight in comparison with Mr. Shauers' negligence, Mr. Warger is still entitled to recover, but the damages to be awarded Mr. Warger must be reduced in proportion to the amount of Mr. Warger's contributory negligence. If you find that the contributory negligence of Mr. Warger is more than slight in comparison with the negligence of Mr. Shauers, Mr. Warger cannot recover.

As indicated in this instruction, you should first determine the question of liability before you undertake to fix an amount that would compensate for damage found to have been suffered.

* * * * *

FINAL INSTRUCTION NO. 26—DUTY AS JURORS

A verdict must represent the considered judgment of each juror. Your verdict must be unanimous. It is your duty to consult with one another and to deliberate with a view to reaching agreement if you can do so without violence to your individual judgment. Of course, you must not surrender your honest convictions as to the weight or effect of the evidence solely because of the opinions of other jurors or for the mere purpose of returning a verdict. Each of you must decide the case for yourself; but you should do so only after consideration of the evidence with your fellow jurors.

In the course of your deliberations you should not hesitate to re-examine your own views, and to change your opinion if you are convinced it is wrong. To bring twelve minds to an unanimous result, you must examine the questions submitted to you openly and frankly, with proper regard for the opinions of others and with a willingness to re-examine your own views.

Remember that you are not partisans; you are judges—judges of the facts. Your sole interest is to seek the truth from the evidence. You are the judges of the credibility of the witnesses and the weight of the evidence.

You may conduct your deliberations as you choose. However, I suggest that you carefully consider all of the

evidence bearing upon the questions before you. You may take all the time that you feel is necessary.

FINAL INSTRUCTION NO. 27— DUTY DURING DELIBERATIONS

There are certain rules you must follow while conducting your deliberations and returning your verdict:

First, when you go to the jury room, you must select one of your members as your foreperson. That person will preside over your discussions and speak for you here in court.

Second, it is your duty as jurors to discuss this case with one another in the jury room. You should try to reach agreement if you can do so without violence to individual judgment because a verdict must be unanimous.

Third, if you need to communicate with me during your deliberations, you may send a note to me through the court security officer, signed by one or more jurors. After conferring with the attorneys, I will respond as soon as possible, either in writing or orally in open court. Remember that you should not tell anyone—including me—how your votes stand numerically.

Fourth, your verdict must be based solely on the evidence and on the law in these instructions. **The verdict must be unanimous.** Nothing I have said or done is intended to suggest what your verdict should be—that is entirely for you to decide.

Finally, the verdict form is simply the written notice of the decision that you reach in this case. You will take this form to the jury room. If your verdict is for Mr.

Warger, use the verdict form entitled "Verdict for Plaintiff." If your verdict is for Mr. Shauers, use the verdict form entitled "Verdict for Defendant." When each of you has agreed on a verdict, your foreperson will fill in the form, sign and date it, and advise the court security officer that you have reached a verdict. You will then return to the courtroom where your verdict will be received and announced.

Dated: September 28, 2010

BY THE COURT:

/s/

Jeffrey L. Viken
United States District Judge

APPENDIX G

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

No. 08-5092-JLV

GREGORY P. WARGER, Plaintiff

v.

RANDY D. SHAUERS, Defendant

TRANSCRIPT OF JURY TRIAL
VOIR DIRE EXAMINATION OF THE JURY

[1] BEFORE THE HONORABLE JEFFREY L. VIKEN, UNITED STATES DISTRICT JUDGE AND A JURY

APPEARANCES:

FOR THE PLAINTIFF: Steven C. Beardsley, Esq.
Travis B. Jones, Esq.
Beardsley, Jensen & Von Wald
4200 Beach Drive, Suite 3
Rapid City, South Dakota
57702

FOR THE DEFENDANT: Ronald R. Kappelman, Esq.
Gregory G. Strommen, Esq.
Banks, Johnson, Colbath,
Sumner & Kappelman
731 St. Joseph Street
Rapid City, South Dakota
57701

COURT REPORTER: Judith M. Thompson,
R.P.R.
Official Court Reporter
909 St. Joseph Street
Suite 505
Rapid City, South Dakota
57701

[2] (Following proceedings in open court.)

THE COURT: My name is Jeffrey Viken. I am a United States District Judge for the District of South Dakota, and it is my honor and pleasure to work with you as prospective jurors for this civil case.

With us this morning is Judy Thompson, our court reporter. Jeana Holso, our deputy clerk, who will be working with us throughout the course of the trial. And my law clerk, Tamie Sawaged.

Would counsel please introduce yourselves and your clients.

MR. BEARDSLEY: Thank you, Your Honor. My name is Steve Beardsley. I represent Greg Warger along with my partner, Travis Jones. And Wendy Hanken is my assistant, also.

THE COURT: Thank you. Defense, please.

MR. KAPPELMAN: Thank you, Your Honor. My name is Ron Kappelman. This is my client, Randy Shauers. My partner Greg Strommen and Nick Carda, assistants with our office.

THE COURT: Thank you, gentlemen.

Jeana, would you please swear our panel, please.

(Panel sworn.)

THE COURT: Ladies and gentlemen, 18 of your number have been selected randomly by computer to be called [3] into the jury box for the jury selection process. So at this time, Jeana, if you would please call those randomly selected 18 names.

DEPUTY CLERK OF COURT: Judith Abdo, Regina Whipple, Raymond T. Williams.

THE COURT: I have Raymond Reynolds.

DEPUTY CLERK OF COURT: So sorry. Raymond Reynolds. Billie Lee McCamly, Allan Zandstra, Barton Isaac Goodwin, Annette Gilby-Merritt.

The next seven persons will go to the second row beginning in the far right. Debra Simpson, Sheila Smith, Mike Besso, Stacey Titus, Terry Whitmyre, Jason Tripp, Michael Napier—I'm sorry. Evidently Mr. Napier is not here. The next name on our list is Joan Lemmel.

The next four jurors if you could take a seat in the last row, again, on the far right. Johnnie Boje.

JUROR: Jamie. Johnnie Knapp, David Rubins, and Joan Murphy—and David Murphy.

THE COURT: Thank you, Jeana.

Ladies and gentlemen, Arnie is the court security officer, the gentleman who is holding the gate open for you so you could come and go. We will have the court security officers with us throughout the trial.

I am going to ask you some questions for those of you who have been called randomly into the jury box for [4] jury selection. Those of you who have not been called if you would please listen carefully to my questions and then to the questions asked by the attorneys; in the event one of our jurors is excused for any reason, Jeana will call the next name on the randomly-selected list to replace the person excused, and then you will be asked, if you are replaced in the jury box, if you have any responses to the questions which have already been asked. So your attention to the questions is greatly appreciated and you are a real service to your fellow prospective jurors here because if one of them is excused for cause or for any reason, we will need you to serve. So I appreciate that very much.

I am going to ask you some questions, ladies and gentlemen, to make certain that you are completely objective and free from bias or prejudices of any kind regarding this case. Any citizen may be a proper juror for a particular case, but in this instance, we have a civil case so we are really going to ask questions and help you decide whether for this particular case you are a fair and impartial juror. You may be a great juror for a criminal case or some other civil case, but not for this case because of your own experiences in life or opinions or beliefs which you hold. So please, the key to this jury selection process is candor and honesty. If you have personal opinions, biases, religious beliefs, notions of [5] any kind

about what the law is or should be, or about any of the matters which may be an issue in the case that we raise during jury selection, just raise your hand and I will call upon you, if I am asking questions, or counsel will, during their part of the jury selection process.

If any question is asked of you and you prefer not to give that answer in the presence of the other jurors in open court, it is perfectly fine to just ask me if we can meet in my office which is right behind this courtroom, and we can then finish the examination there and clear up any questions or concerns that you may have; there may be something of a personal nature in your life that you really don't want to talk about in open court. You don't need to. Just let me know and we will go back into my office. That happens frequently; there's no problem with that at all. We need to protect your privacy if you feel the need to do that.

I am going to just try to explain to you the jury selection process. First of all, what we are trying to do is determine, as I said, whether you can sit fairly and impartially and follow the Court's instructions in this case. And so we are going to ask some questions of you. And when you hear the questions from me or from counsel, just pause and think and reflect for whatever period of time you need to see whether there's something in your [6] heart or mind that makes you feel that you do have a responsive question and we will visit with you further about that as part of the jury selection process.

The second purpose is that we called 18 of you into the box. We are going to have a jury of 12 in this case. The law requires attorneys for the plaintiff and attorneys for the defendant to, after our first portion of jury selection, they have to each eliminate three of your num-

ber. They have no choice. They are called preemptory challenges. Plaintiff and defendant each exercise three preemptory challenges that will reduce your number to 12 and those will be the jurors selected for the case. So your answers to the questions asked are important to the lawyers because in making their decision on who to remove, the information you provide is critical. They have the ability and requirement really to remove three for each side for any reason or for none. They must exercise three preemptory challenges at the conclusion of jury selection. So your answers are very important to them and to their clients as we work through this case together.

Ladies and gentlemen, I'm really in a working partnership with those of you selected as jurors. You will be the judges of the facts in this case. My job is to make rulings based on the law. At the conclusion of the case, I will instruct you on the law that does apply to this [7] particular case, and then you will deliberate with your fellow jurors and make a decision on what the facts are and what the outcome of the case should be. So we are going to work together throughout the course of the trial. We will do everything we can to make this experience a positive and comfortable experience for you.

I would caution you there is a set of steps on what would be my right side as you leave that jury box and head into the jury deliberation room and your break room. Please observe the signs warning you those steps are dangerous. We had a juror take flight earlier this year and we don't want anybody going through that experience. So just be cautious when you are exiting the jury box if you would, please.

We expect this trial could consume eight days of trial time; five days of this week and into next week. It's pos-

sible that the case may take a shorter period of time, but we wanted to estimate out of an abundance of caution for you this case could consume eight days, including your time for deliberations. If there are any one of you who would find it difficult or impossible to serve? Seeing no hands, let me ask you then: do any of you have any impairment or physical or mental disability which would make service on the jury difficult or impossible? Anyone with back problems; you couldn't [8] possibly sit for an eight-day period? Anyone with a hearing problem which really prevents you from being able to fairly pay attention to all of the evidence? Any such problems? Very well. I see no hands.

I am going to read to you a summary of the case and those of you who are selected will hear this again in my preliminary instructions. But let me just frame up the case for you with a statement that both parties have approved.

This is a civil case. On August 4, 2006, in Pennington County, South Dakota, plaintiff, Gregory P. Warger and defendant, Randy D. Shauers, were involved in a collision. Mr. Warger alleges he was injured in the collision and Mr. Shauers' negligence caused the collision. Mr. Warger seeks damages for his injuries. Mr. Shauers denies that he was negligent and that his negligence, if any, caused the collision. Mr. Shauers affirmatively alleges that the collision was caused by the contributory negligence of Mr. Warger.

So that's the nature of our case in this particular trial, ladies and gentlemen. Is there anyone knowing just those basic facts about this type of case who from your experience or background feel that you would not be a proper juror to hear this action? Yes, sir.

MR. REYNOLDS: Yes, Your Honor. Currently my [9] health benefits are from the VA. Prior to that I have 42 years of fire and emergency medical service. Now, I come on a lot of accidents, I assisted Highway Patrol, local law enforcement in investigating accidents and witnesses—lining witnesses up for them. I am not sure that I am a good choice for this particular type of case because I would probably, even if I am trying to be objective, still lean towards the side of what the actual reports from the investigating agency show.

THE COURT: All right. You work so extensively in the matter of accidents and in the medical side of that and with law enforcement you feel you could not objectively hear the evidence presented in the case, is that correct? Is that what I understand?

MR. REYNOLDS: Basically, yes. I would try to be, but prior experience over that many years.

THE COURT: Let me ask you this question, and this is a question for all of you when you think about the issues here. We all come to the courtroom with our life experience, and we are expected to render a verdict based on our common sense. Would you be able, Mr. Reynolds, given your background as you have described it, to set aside—do you think you could set aside your experiences and hear fairly evidence presented by both sides as to the manner in which this collision occurred and who may be [10] responsible?

MR. REYNOLDS: No, Your Honor, I do not.

THE COURT: All right. Well, if you can't sit fairly, sir, I very much appreciate your bringing that to my at-

tention. That's exactly what I am asking and we will excuse you for cause, Mr. Reynolds. Thank you, sir.

Jeana, please call our next juror.

Mr. Reynolds, you are excused. I very much appreciate your participation.

MR. REYNOLDS: Thank you, Your Honor.

DEPUTY CLERK OF COURT: The next juror is Grant Guthrie.

THE COURT: Good morning, Mr. Guthrie.

MR. GUTHRIE: Morning.

THE COURT: Have I asked any question to this point that would cause you to have a concern as to whether you are a proper juror for this case?

MR. GUTHRIE: No.

THE COURT: Ladies and gentlemen, Mr. Reynolds did exactly the right thing and identified himself as having a problem for a case of this nature. Does anybody else have any reason that, given the facts as I briefly described, that you would not be a proper juror to sit in a case of this kind? I see no other hands.

If you are selected to sit on this case will you [11] be able to render a verdict based solely and only on the law as I give it to you in my instructions? Here is what I am asking. There are citizens among us who have every right to hold an opinion as to what the law is or the law should be. I am going to instruct you on the law in this case, and you are required when you take an oath as ju-

rors to follow the law as I give it to you in deciding the case. If you have a religious or political belief or idealogical belief which is contrary to the law as I give it to you, or you just feel that you disagree with the law as I describe it to you, my question is: can you follow the law as I give it to you in my instructions? Is there anyone who for any reason feels that you cannot follow the law as given to you by the Court in this case? I see no hands.

Are you able to disregard any notions or beliefs or ideas that you might have as to what the law should be? Does anyone feel they have a problem with that, disregarding your own notions, beliefs as to what the law should be in the case? I see no hands.

I am going to read the names of witnesses who may be called in the case. And if you know any one of them after I have concluded reading the list, would you please raise your hand. The possible witnesses in this case are Brad Booth, Clint Elmore, Dr. Stuart Fromm, Dr. Robert Medler, Randy Shauers, Fred Shaumberg, Greg Warger, [12] Lieutenant David Berkley, Michelle Shauers, Jubal Hamernik. Do any of you know any of the persons whose names I have just read? Yes, sir.

MR. TITUS: Dr. Fromm.

THE COURT: How do you know Dr. Fromm?

MR. TITUS: He's a pediatrician for my son.

THE COURT: Is there anything in your experience or relationship with Dr. Fromm that would make you –

MR. BEARDSLEY: There's more than one Dr. Fromm in town, Your Honor. I believe that the Dr.

Fromm this gentleman is talking about is not the Dr. Fromm who will be testifying. Stuart Fromm. I think the other Fromm is a lady, but I am not sure, but I know there's more than one.

THE COURT: This is Dr. Stuart Fromm?

MR. BEARDSLEY: He's an orthopedic surgeon.

MR. TITUS: The Dr. Fromm I am speaking about is by Canyon Lake is their office; west side.

MR. BEARDSLEY: I'm sorry to interrupt. Dr. Fromm is out on the hill by the water slide, the orthopedic surgeon, so I think we are talking about a different Dr. Fromm.

THE COURT: All right, Mr. Beardsley, that is helpful. Is that the Dr. Fromm, the one who has his office out by the water slide, is that the one you know?

MR. TITUS: No.

[13] THE COURT: Very well. Anybody else recognize any of the names of the persons I read?

MS. LEMMEL: I know Dr. Fromm, but I don't know what his first name is and he comes to Sturgis, I think; a surgeon for me.

THE COURT: Orthopedic surgeon? And Mr. Beardsley, do you think that's the Dr. Stuart Fromm?

MR. BEARDSLEY: It's funny, Your Honor, because Dr. Stuart Fromm's father was a general surgeon.

THE COURT: You are not just trying to make this difficult? (Laughter.)

MR. BEARDSLEY: No. Then Dr. Stuart Fromm is an orthopedic surgeon and I am not sure the kind of surgery—

MS. LEMMEL: I do know him.

MR. BEARDSLEY: Okay. So I think Dr. Stuart Fromm is the same one testifying. There are three Dr. Fromm's in town. It sounds like it would be the same Dr. Fromm that's going to testify.

THE COURT: Then I will inquire further.

MS. LEMMEL: Is that all right?

THE COURT: It's perfectly fine. The question is this: this is a small town. A lot of us know many of the people, especially when physicians come in and testify which is very common in cases like this one. The question is knowing Dr. Stuart Fromm as you do, is there anything in [14] that experience that would cause you to give more or less weight to his testimony? Do you think you could hear Dr. Stuart Fromm's testimony and weigh it as you could the testimony of any other medical witness in the case?

MS. LEMMEL: Did I understand what you said at the very last? Did I understand something?

THE COURT: Is there anything that would cause you to treat Dr. Stuart Fromm's testimony differently than anybody else?

MS. LEMMEL: No.

THE COURT: Okay. You could fairly hear his testimony and that of all the other witnesses?

MS. LEMMEL: Yes.

THE COURT: That's all we need. Anybody else?

Do any of you know or have any kind of relationship with any of the attorneys in the case who introduced themselves to you? Yes, sir.

MR. ZANDSTRA: Mr. Kappelman and Mr. Strommen before.

THE COURT: All right. And is there anything in your having dealt with them that would cause you to give more or less credence or weight to evidence which they present compared to the attorneys who are on the other side of the case?

MR. ZANDSTRA: No.

[15] THE COURT: Is there anything that would cause you to believe something that they said or disbelieve something they said so as to interfere with your ability to weigh the evidence fairly in the case?

MR. ZANDSTRA: No.

THE COURT: Is it a business relationship?

MR. ZANDSTRA: Yes.

THE COURT: So from your point of view, Mr. Zandstra, you believe that it will not affect your judgment one way or the other that you know Mr. Kappelman and Mr. Strommen?

MR. ZANDSTRA: I don't think so.

THE COURT: Fair enough. That's all we can ask. Anybody else know the attorneys in the case?

MS. SMITH: I only know them through the YMCA.

THE COURT: Okay. Anything in your knowing them through the YMCA that would in any way cause you to give more or less weight to their arguments or any evidence called by them in this case?

MS. SMITH: No.

THE COURT: Okay. Anyone else? Take a minute and just think about any questions that I have asked or the brief description of the case which I have given you. Is there any reason that any one of you feels you could not be a proper juror to sit and hear this case? I see no hands.

[16] Is there any reason that you would not be able to render a fair verdict based solely on the evidence you hear in this courtroom and the instructions given to you by the Court? Any reason at all? Very well.

Ladies and gentlemen, I appreciate your responsiveness; that's exactly what we need to move through voir dire this morning.

I am going to now ask plaintiff's counsel if they wish to conduct the voir dire examination. So if you wish to do that, you may proceed. Mr. Beardsley.

MR. BEARDSLEY: Thank you, Your Honor. May it please the Court. Counsel.

THE COURT: Certainly.

MR. BEARDSLEY: Good morning. My name is Steve Beardsley. You're very responsive already. That's great. Voir dire, as the Judge described, is French for speak the truth. And the reason I start that way is that it is probably your only chance to talk for several days during deliberations, so keep that in mind when we ask questions, both counsel, that we are just trying to figure out who would be fair and impartial jurors for both Mr. Warger and Mr. Shauers.

The question I like to ask jurors when we first come is raise your hand if you really want to be here. That's what I thought.

[17] But the next thing is, as the Judge said, this is a motor vehicle collision and it involves a truck and trailer that ended up hitting my client, Mr. Warger, and has caused damage to him. It was in August of 2006 and very near the time of the Rally that year. And I am wondering if anybody here heard anything about the collision? There was a life-flighting of Mr. Warger to the hospital and very severe injuries. Anybody hear anything about that?

I don't know if the Judge listed the names of the actual parties, but Mr. Warger is from St. Louis. Anybody know Mr. Warger? Probably be odd if you did. And Mr. Shauers is from Utah. Anybody know Mr. Shauers?

The Judge asked if you knew the attorneys and I believe Ms. Smith indicated she knew some of us from the Y, correct?

MS. SMITH: Uh-huh.

MR. BEARDSLEY: And I am kind of a regular over there. Was I one of them that you—

MS. SMITH: Yeah.

MR. BEARDSLEY: And Mr. Strommen is kind of a regular. Anybody else?

MS. SMITH: No.

MR. BEARDSLEY: Anything about that association, anything about that makes any difference to you?

[18] MS. SMITH: No. You guys come in and are very friendly.

MR. BEARDSLEY: Great. That's good. In addition to the lawyers that are here, I think we want to ask if you know any of the other lawyers that practice with Mr. Kappelman and Mr. Strommen. Anybody know Jerry Johnson who practices with them? How about Tim Becker, Bart Banks; I believe it's Nick Carda, a nice young man who just joined them.

Well, I also practice with other people and it's only fair for me to ask if you know them. I practice with Gary Jensen, Larry Von Wald; just raise your hand if you know any of these people. Yes, sir.

MR. ZANDSTRA: I know Gary.

MR. BEARDSLEY: How do you know Gary, sir?

MR. ZANDSTRA: Associations. Knew his brother real well in college.

MR. BEARDSLEY: Bob?

MR. ZANDSTRA: No, Tom.

MR. BEARDSLEY: Tom, the one that's in Minnesota. Anything about your association with Mr. Jensen that would make it hard for you to sit?

MR. ZANDSTRA: (Shaking head.)

MR. BEARDSLEY: I am going to come back with the other deal. Thank you. I think I said Gary Jensen, Larry [19] Von Wald; of course, Travis Jones was introduced. Brad Lee, Jessica Larson, Brett Poppen, and my son, Mike Beardsley, who just joined us. Thank you.

Mr. Zandstra, you did mention that you had a business relationship with Mr. Kappelman and Mr. Strommen, correct? I don't mean to pry, but I've got to ask you: how long ago was this business relationship?

MR. ZANDSTRA: Mr. Kappelman was probably 15 years. Greg, probably been six or seven years.

MR. BEARDSLEY: Was it a—what did it involve? Start with Mr. Kappelman.

MR. ZANDSTRA: My son was injured in an accident; he represented some people.

MR. BEARDSLEY: On the other side?

MR. ZANDSTRA: Yeah.

MR. BEARDSLEY: Mr. Strommen?

MR. ZANDSTRA: He dealt with an insurance company for our firm.

MR. BEARDSLEY: Mr. Strommen was with another firm for a while before he joined that firm. Was that when he was with another firm?

MR. ZANDSTRA: Yes.

MR. BEARDSLEY: Okay. And what did Mr. Strommen do for you?

MR. ZANDSTRA: He was the attorney for our [20] insurance company.

MR. BEARDSLEY: That was involving what, did you say?

MR. ZANDSTRA: Might have been an accident of some kind.

MR. BEARDSLEY: He represented your interests though?

MR. ZANDSTRA: Yes.

MR. BEARDSLEY: But he doesn't represent you any longer?

MR. ZANDSTRA: No.

MR. BEARDSLEY: It's been five, six years?

MR. ZANDSTRA: Right.

MR. BEARDSLEY: Thank you. How many people here have had any prior jury duty? Raise your hand. Thank you. Mr. Murphy, what kind of case was that?

MR. MURPHY: Civil case.

MR. BEARDSLEY: Federal court or state court?

MR. MURPHY: Right here.

MR. BEARDSLEY: How long ago was that?

MR. MURPHY: About a year and a half ago.

MR. BEARDSLEY: And what kind of civil case; was it a motor vehicle collision or contract dispute?

MR. MURPHY: Involved an accident on a loading dock at a grocery store in Spearfish where one of the [21] workers from Safeway was seriously injured.

MR. BEARDSLEY: And did you sit on the jury until a verdict was rendered?

MR. MURPHY: Yes.

MR. BEARDSLEY: And you don't have to be specific, but did you rule for the plaintiff or the defendant?

MR. MURPHY: Defense.

MR. BEARDSLEY: And damages were awarded?

MR. MURPHY: As I recall $600,000.

MR. BEARDSLEY: Anything about that experience sitting on civil jury trial that would affect you sitting on another one?

MR. MURPHY: Not really, other than it's not the most enjoyable thing to decide other people's fate, but that's how the system works.

MR. BEARDSLEY: Well, I think there will be a lot of agreement on that, but it has to be done.

MR. MURPHY: I agree.

MR. BEARDSLEY: I tell people all the time nobody really wants to sit on the jury, but when it's over they realize that it's a really valuable experience. Did you feel that way?

MR. MURPHY: Well, I am a big fan of "Law and Order" and it's the real deal; it's not quite the same as [22] TV.

MR. BEARDSLEY: It's funny—

MR. MURPHY: It was interesting to find out how the system works. It's been a long time. I served on another federal jury back in Aberdeen where I am from, but that was a criminal case a long time ago.

MR. BEARDSLEY: Well, you bring up TV. It's interesting because on TV they get the case in the morning and try it in the afternoon. Here it takes a lot of time to get there, and there are other differences, of course. You did find it to be a valuable experience?

MR. MURPHY: Yes.

MR. BEARDSLEY: I didn't catch all the people that raised your hand. If you would raise your hands again. Yes, Mr. Knapp, what kind of jury were you on?

MR. KNAPP: Federal and county.

MR. BEARDSLEY: And State? And how long ago was that?

MR. KNAPP: It's been probably six years ago.

MR. BEARDSLEY: Did you find the person guilty or not guilty? You had two, though, right?

MR. KNAPP: Yeah.

MR. BEARDSLEY: Let's do the federal one first.

MR. KNAPP: Guilty.

MR. BEARDSLEY: What kind of crime was it?

[23] MR. KNAPP: Death was incurred.

MR. BEARDSLEY: Serious matter. And the state court matter, what was that?

MR. KNAPP: That was a rape case.

MR. BEARDSLEY: Did you find him guilty or not guilty?

MR. KNAPP: Guilty.

MR. BEARDSLEY: Anything about those experiences as a juror that now you go, "Geez, I don't want anything to do with this anymore. I don't want to sit," or are you okay with it?

MR. KNAPP: I am okay with it.

MR. BEARDSLEY: You didn't raise your hand about wanting to be here. You don't want to go that far?

MR. KNAPP: No.

MR. BEARDSLEY: Okay. In the second row there were some hands of people. Yes, ma'am, Ms. Simpson.

MS. SIMPSON: Yes. I served on a federal jury about 17 years ago; arson case.

MR. BEARDSLEY: Here?

MS. SIMPSON: Yes.

MR. BEARDSLEY: How was that experience?

MS. SIMPSON: Very interesting.

MR. BEARDSLEY: How long did that take?

MS. SIMPSON: Couple days, as I recall.

[24] MR. BEARDSLEY: Anything about that experience that makes you want to not do this again?

MS. SIMPSON: No. It's an interesting experience.

MR. BEARDSLEY: Good. You understand this is a civil matter, not a criminal matter. The Judge is going to give you instructions on the law and I am going to talk a little bit later about between beyond a reasonable doubt and greater convincing force; there's a difference. Do you understand there may be differences in the burden of proof?

MS. SIMPSON: Yes.

MR. BEARDSLEY: Also in the second row there were some other people that raised their hand. Yes, sir, Mr. Besso. What kind of matter did you serve as a juror?

MR. BESSO: I had a civil one in Deadwood involving a robbery.

MR. BEARDSLEY: Okay. It was two parties fighting over whether or not somebody actually robbed him? It was civil?

MR. BESSO: Yeah.

MR. BEARDSLEY: Interesting. How long ago was that, sir?

MR. BESSO: 15 years ago.

MR. BEARDSLEY: And did you determine that somebody did rob somebody, or how did it come out?

[25] MR. BESSO: It was guilty.

MR. BEARDSLEY: And anything about that experience that would affect you here today?

MR. BESSO: No.

MR. BEARDSLEY: You want to do this?

MR. BESSO: (Nodding.)

MR. BEARDSLEY: Anybody else in the second row have any jury duty? How about in the back row, anybody been on a jury before? Mr. Zandstra, what kind?

MR. ZANDSTRA: Criminal trial in state court.

MR. BEARDSLEY: How long ago was that?

MR. ZANDSTRA: 20 years ago.

MR. BEARDSLEY: The way you said 20 years, I assume it's not going to affect your sitting here today. Anybody else? Yes, Ms. Whipple.

MS. WHIPPLE: I served on Federal Grand Jury about 13 years ago.

MR. BEARDSLEY: Criminal matter since it was a grand jury.

MS. WHIPPLE: Yes.

MR. BEARDSLEY: It was different from this.

MS. WHIPPLE: Yes, different.

MR. BEARDSLEY: Anything about that experience affect you at all?

MS. WHIPPLE: No.

[26] MR. BEARDSLEY: Anybody else I missed that sat on a jury before?

Anybody—other than Mr. Zandstra because he brought it up—anybody have to ever sue somebody to enforce their rights? Just raise your hand. Have you ever had to sue somebody? Yes, sir, Mr. Titus.

MR. TITUS: Yes.

MR. BEARDSLEY: Last time we were talking about Dr. Fromm. So what was—when did you do that?

MR. TITUS: It would have been in 1999, I believe.

MR. BEARDSLEY: And what did that regard? You don't have to go into detail, just kind of tell me what it was about.

MR. TITUS: It was a business dispute.

MR. BEARDSLEY: Okay. Kind of a contract type thing?

MR. TITUS: Yeah.

MR. BEARDSLEY: Did it go all the way to a trial or did it settle before?

MR. TITUS: We had a trial in front of a judge, not in front of a jury.

MR. BEARDSLEY: Not a jury. But you actually tried it and had witnesses? Okay. How did it come out?

MR. TITUS: Came out the way we went in; the [27] number didn't change.

MR. BEARDSLEY: Sometimes that happens. Was it Judge Johnson?

MR. TITUS: Judge Trimble.

MR. BEARDSLEY: It was in Deadwood?

MR. TITUS: No, Pennington County.

MR. BEARDSLEY: I'm sorry. Anything about that experience that now you just go, "Geez, I don't like how the system works." Or you just kind of narrow that to your—

MR. TITUS: Yes, I can say narrow. The system works. It was great. It went in great, it came out great.

MR. BEARDSLEY: Okay. Do you have any problem with people that have to bring a suit to enforce their rights for damages?

MR. TITUS: No.

MR. BEARDSLEY: Anybody else ever had to sue anybody? Anyone here ever been sued? Mr. Murphy.

MR. MURPHY: Indirectly by—

MR. BEARDSLEY: The company you were with?

MR. MURPHY: I had a car accident and it involved the principal of my high school in Aberdeen and his insurance company filed suit against my insurance company or indirectly, me.

MR. BEARDSLEY: Did it go to trial?

[28] MR. MURPHY: Yes. They subpoenaed me out; I didn't know I was supposed to testify that day and they yanked me out of school at Northern to testify.

MR. BEARDSLEY: So you were in college?

MR. MURPHY: Yes.

MR. BEARDSLEY: And so not to age you, but that's been a while.

MR. MURPHY: That's been a long time ago.

MR. BEARDSLEY: So you didn't even know you were going to have to testify?

MR. MURPHY: I wasn't told that by the lawyer for my insurance company; that's why they had to come get me.

MR. BEARDSLEY: All of sudden they got a subpoena for you.

MR. MURPHY: The sheriff of Brown County came and got me.

MR. BEARDSLEY: In class. Now, that's a wakeup call. How did it go?

MR. MURPHY: Actually it came out that both parties took care of the damage of their own insured and that was that.

MR. BEARDSLEY: Anything about that experience that might color your thoughts on a civil procedure like this?

MR. MURPHY: Not really.

[29] MR. BEARDSLEY: Anybody—you know, this is a difficult question. Yes, sir. You raised your hand. Go ahead.

MR. TITUS: I did have another civil case. I told you about the first one.

MR. BEARDSLEY: Yeah.

MR. TITUS: Second one I was sued on a property dispute and it went to the State Supreme Court, so there's been two.

MR. BEARDSLEY: And the second one you said was a property dispute?

MR. TITUS: Yes.

MR. BEARDSLEY: Somebody then had sued you?

MR. TITUS: Correct.

MR. BEARDSLEY: And not only was it tried, but then it went to the State Supreme Court on appeal?

MR. TITUS: Correct.

MR. BEARDSLEY: Anything about that experience that makes you think you don't like this civil system we have?

MR. TITUS: I don't like having my name in a case.

MR. BEARDSLEY: I suppose because now it's there forever, right?

MR. TITUS: No. That was it. We won the case, [30] so I am satisfied with it.

MR. BEARDSLEY: And this is kind of generally; anybody here just think, "I don't like this system. I don't like the fact that somebody comes to court and is asking for redress or asking for a remedy from the jury."

Anybody here have a problem with our judicial system working the way it is? Ms. Lemmel, how do you feel about it? You have your arms crossed.

MS. LEMMEL: I haven't been in any of this; it's all new to me. I have my thoughts.

MR. BEARDSLEY: Thoughts on what?

MS. LEMMEL: Thoughts on different projects.

COURT REPORTER: I can't hear you.

MR. BEARDSLEY: Thoughts on different projects. Is that what you said?

MS. LEMMEL: Well, on anything. I have my thoughts.

MR. BEARDSLEY: That's fair. We all have our thoughts on different things. How do you feel about people being able to come to a court like this and have 12 people decide issues?

MS. LEMMEL: It's scary.

MR. BEARDSLEY: It is scary. Is it scary enough that you just don't like the concept?

MS. LEMMEL: I can take this area, unless it's [31] really—you are making a lot out of it. Depends on what you get out of it.

MR. BEARDSLEY: We are going to get into that so if something trips your trigger and you no longer want to do it, you let me know.

Mr. Tripp, how do you feel about lawsuits?

MR. TRIPP: How do I feel about lawsuits?

MR. BEARDSLEY: Yes.

MR. TRIPP: I feel there will probably be certain judgments against them.

MR. BEARDSLEY: They are okay to come to court and have 12 people decide the issues?

MR. TRIPP: Yes.

MR. BEARDSLEY: Ms. Whitmyre, how do you feel about it?

MS. WHITMYRE: I guess I feel like you can't resolve your problems.

MR. BEARDSLEY: Better than going out back, I suppose?

MS. WHITMYRE: Used to do that, too.

MR. BEARDSLEY: I know. How about you, Mr. Titus, is it okay? You have been there a couple times. Mr. Besso.

MR. BESSO: I have no problem.

MR. BEARDSLEY: Ms. Smith.

[32] MS. SMITH: No.

MR. BEARDSLEY: Ms. Simpson.

MS. SIMPSON: No.

MR. BEARDSLEY: Ms. Abdo. Did I pronounce that correctly?

MS. ABDO: Yeah.

MR. BEARDSLEY: What do you think about being able to come to a court and present their case for a jury?

MS. ABDO: Really I think that if you had done something wrong that's against the law that you should take responsibility for that and not try to come to court to find a loophole to get out of it or have it dropped down any less.

MR. BEARDSLEY: And you are okay with people then coming to court and having 12 jurors decide?

MS. ABDO: Yeah, I am okay with it. I just don't think it's right. If you did it just say you did it and get the punishment and go through with it.

MR. BEARDSLEY: Thank you. Ms. Whipple, how do you feel about lawsuits?

MS. WHIPPLE: I think they are probably necessary in most instances to—because everybody sees things differently. You can hear two different stories about the same thing.

MR. BEARDSLEY: Okay. Thank you.

[33] MS. WHIPPLE: Bring it before a body of your peers and have it decided, I guess.

MR. BEARDSLEY: Mr. Guthrie, what do you think?

MR. GUTHRIE: Yeah, I think it's perfectly legitimate if you can't resolve the disputes between yourself. I think it would be childish if you can't figure it out if you were clearly in the wrong to not be able to pay out or sue somebody if you were wrong. I mean, it becomes unfortunate to have a trial, but obviously within his rights.

MR. BEARDSLEY: Thank you. Mr. McCamly, did I pronounce that right?

MR. MCCAMLY: Sure.

MR. BEARDSLEY: Okay. What's your thoughts about lawsuits for damages or injuries?

MR. MCCAMLY: I think the process is how it should be. It comes to the court to decide with your peers and hear the facts; go from there.

MR. BEARDSLEY: Mr. Zandstra, how about you?

MR. ZANDSTRA: As far as civil cases?

MR. BEARDSLEY: Yes.

MR. ZANDSTRA: I think there's too many of them.

MR. BEARDSLEY: Thank you. Why do you say that?

MR. ZANDSTRA: I think some of them are too frivolous.

[34] MR. BEARDSLEY: If it's not frivolous, if it's a serious injury—and we are going to get into the injuries here—and Mr. Warger lost his leg, had surgery, five surgeries on his arm. Very, very serious injuries. And so

there's going to be medical testimony about the injuries and Mr. Warger is going to testify to it as well. How do you feel about it if it's a serious matter?

MR. ZANDSTRA: It's necessary.

MR. BEARDSLEY: Mr. Goodwin, I haven't talked to you yet. How do you feel about it?

MR. GOODWIN: Well, if it's necessary to take it to court, it's probably necessary to take it to court. But I don't feel—I feel it should be resolved outside of court. I'd like to bring up the example in 2001 I was in a car wreck in Gillette, Wyoming. I was a passenger; and the gal that was driving—I got knocked unconscious; I don't remember none of it.

MR. BEARDSLEY: I'm sorry, the last part, you got knocked unconscious?

MR. GOODWIN: Yes, I was knocked unconscious so I don't remember being in the hospital or getting in the car. All I know is what was told as to the matter and what is going on now. So yes, I think it's probably necessary.

MR. BEARDSLEY: You brought up a very good point. Mr. Warger was life-flighted from the scene and he doesn't [35] remember the collision either. There are other witnesses, the witnesses that saw it, and then the defendant will testify. Raise your hand if you have any problem that Mr. Warger just doesn't remember it because he went through all this? He has retrograde amnesia. It sounds like you had the same thing; you don't remember anything.

MR. GOODWIN: Only what I was told.

MR. BEARDSLEY: And were you—I know you were unconscious. Were you injured in addition to that?

MR. GOODWIN: Yes, I was. I had stitches right here.

MR. BEARDSLEY: On your head?

MR. GOODWIN: 32 stitches in my head. I had to have the jaws of life get me out of the car. Saved the passenger—or the driver from going through the windshield.

MR. BEARDSLEY: Okay. Thank you. Anything about your experience that you think would make a difference in judging what went on here in this truck and trailer running into the back end of Mr. Warger's motorcycle? Anything about your experience that—you brought it up and I'm glad you did—that would affect you as a fair and impartial juror because what you went through?

MR. GOODWIN: Was it at night?

MR. BEARDSLEY: No, it was during the middle of [36] the day.

MR. GOODWIN: No.

MR. BEARDSLEY: So you think you could be fair on this case even though you went through an injury in a motor vehicle collision?

MR. GOODWIN: Yes.

MR. BEARDSLEY: Thank you. Ms. Gilby.

MS. GILBY-MERRITT: No, no problem.

MR. BEARDSLEY: Don't have any problem with the lawsuit?

MS. GILBY-MERRITT: No.

MR. BEARDSLEY: Don't have any problem coming into the court to redress your concerns?

MS. GILBY-MERRITT: No.

MR. BEARDSLEY: Mr. Murphy, you have been there and done that. What do you think about lawsuits, civil lawsuits?

MR. MURPHY: I guess I don't have a real problem. Only comment I would have I don't think we are going to control it. I think there's been too much national publicity by certain law firms that precipitates a lot of civil action and lawsuits. As I recall, many years ago they changed how much advertising law firms could do; and I think they have kind of gone in the wrong direction. If you were receiving similar funds from that, I guess you [37] wouldn't have the same opinion.

MR. BEARDSLEY: I have been around a while, too, and they didn't have any advertising. And you have concerns about that because it's kind of gone over the top?

MR. MURPHY: Yeah.

MR. BEARDSLEY: Just taking that concern and transferring it to Mr. Warger's instance in which he is here because of very serious injuries, that change in ad-

vertising, does it affect how you feel about whether somebody can come here to redress this problem?

MR. MURPHY: No. It's just my own thoughts on what's transpired in the last 25 years.

MR. BEARDSLEY: I kind of agree with you. I wish we could go back. I don't think we are going there.

MR. MURPHY: No.

MR. BEARDSLEY: Any other thoughts? Looks like you are still thinking.

MR. MURPHY: No. I would mention this has nothing to do with this, but for those in the legal profession I forgot to mention the lawyer that represented my insurance company when I was sued, this is someone that you might be familiar with, Chuck Kornmann; that was his very first case.

MR. BEARDSLEY: Sure. He's a federal judge in the northern district.

[38] MR. MURPHY: It was his very first case.

MR. BEARDSLEY: If I run in to him I will mention that I met you. Thank you.

Mr. Rubins, you kind of knew you were along the line here, didn't you?

MR. RUBINS: Yes, sir.

MR. BEARDSLEY: What's your thoughts about people bringing a lawsuit when they have been injured civilly in a lawsuit?

MR. RUBINS: I believe it's the best system in the world; it's a civilized way to resolve conflicts; otherwise it would be chaos. I believe there's some that are frivolous, but in this case it's a serious matter, so—.

MR. BEARDSLEY: Thank you. Mr. Knapp, what do you think about lawsuits. You are smiling at me. What's on your mind?

MR. KNAPP: I don't know. I am a motorcycle rider.

MR. BEARDSLEY: We are going to get to that.

MR. KNAPP: I noticed you said—and I was in an accident involving a motorcycle.

MR. BEARDSLEY: And my guess is you have been a motorcycle rider for a long time.

MR. KNAPP: Definitely.

[39] MR. BEARDSLEY: Let's take this in stages, okay? First of all, how do you feel about lawsuits in general if somebody gets injured like Mr. Warger that he can come here and ask 12 people to make a decision regarding both the cause and the injuries; is that—you are okay with that concept?

MR. KNAPP: I think it's all right.

MR. BEARDSLEY: Now, let me go on to your experience, and I appreciate you bringing it up. You had a motorcycle accident; collision?

MR. KNAPP: Yes.

MR. BEARDSLEY: When was that?

MR. KNAPP: About 15 years ago.

MR. BEARDSLEY: Okay.

MR. KNAPP: I was not riding the motorcycle.

MR. BEARDSLEY: You were not?

MR. KNAPP: No.

MR. BEARDSLEY: What kind of a collision was it?

MR. KNAPP: Motorcycle rider ran into a truck.

MR. BEARDSLEY: Ran into a truck. And how were you involved?

MR. KNAPP: I was in the truck.

MR. BEARDSLEY: Okay. But you do ride motorcycle?

MR. KNAPP: Yes.

[40] MR. BEARDSLEY: In this instance you were in the truck?

MR. KNAPP: Yes.

MR. BEARDSLEY: And the motorcycle hit the side or the back end?

MR. KNAPP: Front. Head on.

MR. BEARDSLEY: Head on. Serious injuries, I assume?

MR. KNAPP: Passed away.

MR. BEARDSLEY: And you were driving or you were just in the truck?

MR. KNAPP: I was in the truck. It was a striping truck; we were striping roads.

MR. BEARDSLEY: Okay. Somehow the motorcyclist ran into the truck?

MR. KNAPP: Yes.

MR. BEARDSLEY: We are talking this week about Mr. Warger, who goes from Sheridan Lake Road on to 385 and was going to turn in our part of the signal on, because they have to stop. And Mr. Shauers is coming from behind in a truck and trailer and runs into the back end of him. Your fact that you are talking about is a different—totally different situation. I am sure it was traumatic for you because somebody passed away. Do you feel comfortable being able to judge this situation in light of [41] your life experience involved in this? Do you think you can do that?

MR. KNAPP: Possibly.

MR. BEARDSLEY: You know we can't shut out everything in the past and no lawyer or judge can expect you to do that. But the Judge is going to make determinations of what evidence will be presented and the law. Are you comfortable following, then, what the Judge determines and allows and judging it on that?

MR. KNAPP: Yeah, I think so.

MR. BEARDSLEY: Okay. So you said you are a motorcycle rider. Ever had any collisions on a motorcycle?

MR. KNAPP: Yes.

MR. BEARDSLEY: How many?

MR. KNAPP: Two.

MR. BEARDSLEY: Two. That's pretty good. You have been driving for 50 years, I suppose.

MR. KNAPP: Probably longer.

MR. BEARDSLEY: Any serious collisions?

MR. KNAPP: No.

MR. BEARDSLEY: You keep looking at me. Is there something else I am not asking you? Am I missing something?

MR. KNAPP: No.

MR. BEARDSLEY: Nobody injured on the other [42] motorcycle collision?

MR. KNAPP: Me, yeah, I guess.

MR. BEARDSLEY: Can you tell me what happened?

MR. KNAPP: I really am not sure.

MR. BEARDSLEY: Okay. You had a retrograde—

MR. KNAPP: No.

MR. BEARDSLEY: How come you are not sure?

MR. KNAPP: I don't know where the car come from.

MR. BEARDSLEY: You collided with the car?

MR. KNAPP: Uh-huh.

MR. BEARDSLEY: Any lawsuit from that?

MR. KNAPP: No.

MR. BEARDSLEY: And that happened twice?

MR. KNAPP: Once.

MR. BEARDSLEY: What was the other?

MR. KNAPP: I was on a race track.

MR. BEARDSLEY: Things like that happen on the race track. Am I missing anything? Have we covered that? Thank you.

Ms. Boje. Am I pronouncing it right?

MS. BOJE: Yes.

MR. BEARDSLEY: When I was talking about motorcycle riding, you were kind of nodding. Do you ride motorcycle?

MS. BOJE: I do.

[43] MR. BEARDSLEY: Do you ride your own?

MS. BOJE: I do.

MR. BEARDSLEY: How long have you been doing that?

MS. BOJE: I had my license for about the last three years. Before that I have done dirt bikes, and things like that when I was much younger. My entire family, brother-in-law, we have all grown up that way. Been in lots of accidents. I tend to lean towards the rider's perspective.

MR. BEARDSLEY: Because of the background?

MS. BOJE: Because you have to be aware of what is around you when you are riding. So if you get in an accident, mainly, if you are run into, there's, in my point of view, there's no way that that could be.

MR. BEARDSLEY: Somebody wasn't watching?

MS. BOJE: Yes.

MR. BEARDSLEY: Have you been in a motorcycle collision?

MS. BOJE: Not me.

MR. BEARDSLEY: But your family has?

MS. BOJE: Family has, yes.

MR. BEARDSLEY: And what kind of bike do you have?

MS. BOJE: What kind of bike do I have? I have a [44] Yamaha V Star.

MR. BEARDSLEY: We are looking for a fair and impartial jury. And like I said to Mr. Knapp, you can't just—everything, your life experience, you can't just throw it out the window. But the question is: can you be fair, okay, to both sides? And the Judge is going to give

you the instructions and the law and you are going to judge the facts, and he is going to make rulings as we go, on evidence. And the question then comes down to even though you have experience with motorcycles, can you look at both sides and can you be fair? Can you do the best you can to be fair?

MS. BOJE: I'd like to think I could.

MR. BEARDSLEY: And that's all. See, you can't just push everything aside. We as lawyers, as the Judge said, we have to strike three people, they have to strike three people, and all you can do is say, "I am going to try the best I can." Would you do that?

MS. BOJE: I would try.

MR. BEARDSLEY: That's good. Any problem with lawsuits in general?

MS. BOJE: No.

MR. BEARDSLEY: The burden of proof here is not a criminal case. In a criminal case it is beyond a reasonable doubt, so if you had the scales of justice it [45] would be like this. In a civil case, negligence case, it's greater convincing force. It's not equal, just above equal. And so it's a different burden. Anybody have a problem with the concept that in a civil case Mr. Warger's burden is simply to prove the case a little more, tip the scales a little bit more than the other side. Then he's—whether it's an issue of liability or an issue of damages in proving injury, obviously, he has got very serious injuries, but anybody have a problem with our judicial system in civil cases if you just have to prove your case, tip the scales a little

more than the other side in order to be victorious? Mr. Besso, how do you feel about that?

Is that okay with you?

MR. BESSO: Yeah, fine with me.

MR. BEARDSLEY: Mr. Titus? You've got the same kind of smile as Mr. Knapp down here. It's kind of like you have got something to say.

MR. TITUS: Well, my own experience?

MR. BEARDSLEY: Yes.

MR. TITUS: It was—we went to a case over evaluation of stock ownership. The number that we went in with is what we ended with so it stayed the same. It didn't tilt one way or the other. In my mind, that's crazy how could it not; how can you come, go in and spend four months doing preparing stuff, and it come back in and [46] basically have the same number.

MR. BEARDSLEY: I can understand your frustration. And that was a judge deciding that?

MR. TITUS: Correct.

MR. BEARDSLEY: You feel better that we have 12 experienced, reasonable people; we don't know which 12 yet, by the way, but we will have 12 people that will get together and in the jury room, go through everything and decide did the plaintiff prove their case with greater convincing force? That idea of a little more than the other, you don't have to prove it this way. Are you okay with that?

MR. TITUS: Yes, I would like to have that. I agree.

MR. BEARDSLEY: All you need is a little more and you thought you proved your end a little more or more than that, but—

MR. TITUS: So did the other ones, I am sure.

MR. BEARDSLEY: Sure. Ms. Whitmyre, how do you feel about that, that the burden of proof for us to prove our case is tipping the scales not beyond a reasonable doubt. You okay with that?

MS. WHITMYRE: I am okay with that.

MR. BEARDSLEY: If the Judge says that's the law, you could follow it?

[47] MS. WHITMYRE: Yeah.

MR. BEARDSLEY: You have concerns, though, or are you just thinking?

MS. WHITMYRE: I am just thinking.

MR. BEARDSLEY: That's a good idea. We should think.

Mr. Goodwin, how about you?

MR. GOODWIN: It would always be a little bit higher for the one that got hurt for me.

MR. BEARDSLEY: Can you explain that a little bit?

MR. GOODWIN: Because in my instance, there was never no court, no nothing. I never got nothing out of

mine and I am permanently damaged. So in my opinion I think he should always get a little bit more than what I got.

MR. BEARDSLEY: In that you think that the burden on the plaintiff should be higher than a greater convincing force or he should get what more?

MR. GOODWIN: He should get something out of it.

MR. BEARDSLEY: If he proves his case, he should get something?

MR. GOODWIN: Whether he proves it or not he should get a little something. That's the way I look at it because of my experience. I never did get nothing out of [48] mine.

MR. BEARDSLEY: So does it bother you that as we sit here today and we are going to judge the amount of injury of Mr. Warger?

MR. GOODWIN: Yes, it does.

MR. BEARDSLEY: Let me try to finish. That's okay. You are good. You are supposed to talk. And that we are going to ask for a substantial sum because he lost his leg, he had over $300,000 in medical expenses, we are going—and future medical expenses are from 5 to $800,000 we are going to be asking for a substantial sum. Does it bother you—would you have trouble awarding a substantial sum to Mr. Warger because you didn't get anything when you got injured?

MR. GOODWIN: Yes, that would reflect on me.

MR. BEARDSLEY: And you would have trouble awarding for Mr. Warger if—

MR. GOODWIN: No, I don't think he should be awarded because I never did.

MR. BEARDSLEY: Okay. You wouldn't resent Mr. Warger for doing this at all even though you had that experience?

MR. GOODWIN: No.

MR. BEARDSLEY: Okay. Thank you.

Ms. Merritt, how do you feel about this burden of [49] proof? Is it okay for the plaintiff according to law can recover; they just need to show a little more, more likely than not it occurred?

MS. GILBY-MERRITT: Yes.

MR. BEARDSLEY: That's okay?

MS. GILBY-MERRITT: Uh-huh.

MR. BEARDSLEY: Anybody—I don't want to call everybody's name—anybody say, "You know, I think it's got to be more. I think he's got to have it way up here." Anybody feel that way that just kind of has a thought, "No, no, I think it should be more?"

MR. GUTHRIE: Are you talking about the amount or just who?

MR. BEARDSLEY: We are going to get to the amount.

MR. GUTHRIE: I mean, what are you saying? There's three different things you are asking. Are you saying—I mean, the way you were phrasing it you are saying is it okay to find for your client, yeah, you do only need greater substantial force, or whatever, but as to the amount maybe you mean for both?

MR. BEARDSLEY: Okay. Very good question. Let me break it down and how you feel. Very good question. The law is, as the Judge will instruct, that you have to prove your case by a greater convincing force and there's [50] two parts. One part is causation or liability; the other part is the amount of damages that we have proved. So as to liability, yes, it's greater convincing force, it's just a little bit more. More likely than not. You okay with that?

MR. GUTHRIE: Yes.

MR. BEARDSLEY: Now I am going to go to the injuries; we are going to talk about the injuries. Okay. Again, the burden of proof of proving the injuries is still just slightly higher than not proving it. Now, in this instance, we have two doctors that did a whole series of surgeries on this gentleman. There aren't any doctors that say he didn't get injured; that's not an issue. The issue on how much burden of proof is we have the burden of proof; the plaintiff has the burden of proof of proving how much injury he has not only from that day, or that the series of surgeries he had, but how does that affect his life? And we are going to prove that. And then as a group, the 12 of you, if you decide for Mr. Warger, then we'll decide what is fair compensation for his losses and that is a burden, same kind as fair and convincing force. You still look confused.

MR. GUTHRIE: Well—

MR. BEARDSLEY: Am I right?

MR. GUTHRIE: You are asking for a tipping of the [51] scales on a graduated curve, right? So are you saying we have got to decide where the scales tilt along this curve?

MR. BEARDSLEY: Let me give you an example. Loss of earning capacity, loss of earnings during the time that he's in the hospital, in the nursing home; you know, if there were some evidence on the other side that said, no, I don't think he lost 15, $16,000; he really only lost 8, then the jury would determine shall we consider loss of earnings and then decide based on greater convincing force. Okay. So they are each part of the damage. Medical expenses are over $367,000. If we prove on tipping the scales that, yeah, this is what he incurred and they are responsible for it, then by law, that's part of what the jury should consider in determining how much damages. Okay. Do you understand that?

MR. GUTHRIE: Yeah. I mean, if you have a black and white amount it's easy to make that kind of decision. Yeah, it's owed. But I don't see how you can balance two, like an amount over the black amount; I mean, black and white amount that's been transacting; or I don't see how you can convert the two.

MR. BEARDSLEY: Let me try the other way. Very good questions. I appreciate your discussion. Hopefully everybody else is listening as well. There are certain things we are going to ask as damages. I am going to ask [52] if anybody has any problem with it. One is medical expenses incurred, black and white, $367,000 plus. Okay.

Then there's future prosthetics because this leg, he has a leg from here on down, needs to be replaced because it wears out every three to five years. It's extremely expensive. And there would be testimony by us by doctors and by a prosthetic man that it will cost, over his life-expectancy, anywhere from 5 to $800,000 to replace the leg; that's another black and white, but there could be some discussion about it. But it leads me into—and the Judge will also instruct—allowing a number for the pain and suffering that he's experienced and will experience the rest of his life. Now, that is a lot less black and white than medical expenses and future medical expenses. Okay? You following me?

MR. GUTHRIE: And I don't think—I don't know that, that what you are talking about, I don't know that I could—I don't know that anybody could be instructed on what's right and wrong there. I don't think you can say, hey, this is a formula we are going to plug in. It would be my personal opinion whether—you know, what I think is right. I don't think anybody can tell me what is right or wrong in that case. I don't think it's possible.

MR. BEARDSLEY: The Judge will give you categories of allowance of damages for injury: medical [53] expenses, future medical expenses, pain and suffering, loss of enjoyment of life. And he doesn't tell you to do any of those. He leaves it up to 12 people to get their heads together and talk about it and decide what is fair compensation. So he's not going to tell you. We are going to talk to you about it; and then you guys, if you get to that issue, will decide what's fair and reasonable compensation. If it's like that, are you comfortable with that concept where 12 people then will get together and look at the

options the Judge gives you and make decisions? Are you okay with that?

MR. GUTHRIE: See how it applies to this greater force thing? I mean, then we are just going in with our opinion; we are not really objectively looking at any sort of fact is the way it feels like to me. Feels like we are just going to go in and render our opinion as let's do that, that's cool. I can do that. But I don't see how that applies.

MR. BEARDSLEY: Greater convincing force.

MR. GUTHRIE: Yes.

MR. BEARDSLEY: The burden on the plaintiff if they are going to claim pain and suffering, use your common sense, the burden of the plaintiff is they don't have to prove pain and suffering beyond a reasonable doubt, they only have to prove it in a greater convincing force. Or [54] loss of enjoyment of life at a reasonable—beyond a reasonable doubt. Loss of enjoyment of life would be greater convincing force. That's just a burden. You have to take all of this as jurors and come together and make decisions. Okay?

I do want to talk to you about whether or not if we prove our case if you are comfortable of the awarding of medical expenses if we prove, even though it's a large number, if we prove that medical expenses incurred are $367,000, raise your hand if anybody has a problem with if we prove our case awarding those kind of medical expenses; anybody have a problem?

We are also going to present evidence of future medical expenses: medicine; he takes Neurontin because he

has what's known at phantom pain. And the doctors will talk about that, as he will. That even though his leg is gone, the nerves have been cut and it goes all the way down and he feels sensation in his entire leg and has pains and he'll talk to you about that. And so he needs medication for that.

In addition this concept that you have to replace the prosthetic leg, a socket and the leg, between three to five years. You will hear the testimony about that and the future cost of life expectancy is anywhere from $500,000 to $800,000.

[55] I am going to be more specific on this. Ms. Abdo, do you have a concern about future medical expenses like I talked about the medications and the prosthetic device? Can you award that if we prove our case?

MS. ABDO: Yeah, I sure could. I kind have been through a situation with this. My husband was in an accident at work and ended up only living 12 days. And then I got a divorce from that and I really didn't think it was ever going to be enough, I mean, because I couldn't ever get him back, so I really have no problem with that part whatsoever.

MR. BEARDSLEY: Thank you. How about Ms. Whipple, the concept of future medical expenses, any problem with that?

MS. WHIPPLE: No.

MR. BEARDSLEY: If we prove our case. Mr. Guthrie? Depends on this—

MR. GUTHRIE: No. I mean, if it completely wipes him out is it fair? I mean, if it's an accident why should he and his family suffer forever? I don't know what happened.

MR. BEARDSLEY: The duty of the jury is to decide liability and decide what's fair compensation, not the effect of that. Just the numbers. You understand that?

MR. GUTHRIE: Yeah, I understand that. I don't [56] know if that is right.

MR. BEARDSLEY: You have a concern. Thank you. Mr. McCamly, how do you feel about future medical expenses? Even though it's a big number, are you comfortable with that if we prove it?

MR. MCCAMLY: If you prove it, I believe he's entitled to it. Has he been—has there been a guilty—was he in the wrong doing his traffic violation? Was he found guilty of doing something wrong? I don't know the facts of the case yet, but if we are here for medical reasons, if he's entitled to it, and we put our heads together and come up with it, then I have no problem with him being compensated.

MR. BEARDSLEY: Thank you. And in half answer to your question, this is a civil case; nobody is going to jail, nobody is going to be found guilty, but responsible, liable, and the Judge will give instructions on that and determine if the defendant is liable, and then you go on to the damage issue.

Mr. Zandstra, are you comfortable with future medical expenses even though it's a substantial number if we prove it?

MR. ZANDSTRA: As long as you prove it.

MR. BEARDSLEY: Mr. Goodwin.

MR. GOODWIN: Yes.

[57] MR. BEARDSLEY: Ms. Merritt.

MS. GILBY-MERRITT: As long as you prove it.

MR. BEARDSLEY: Ms. Lemmel.

MS. LEMMEL: As long you prove it.

MR. BEARDSLEY: Mr. Tripp.

MR. TRIPP: Yes.

MR. BEARDSLEY: Ms. Whitmyre.

MS. WHITMYRE: Probably.

COURT REPORTER: I didn't hear what she said.

MR. BEARDSLEY: She said probably and she kind of wrinkled up her nose and nodded.

Mr. Titus.

MR. TITUS: Yes.

MR. BEARDSLEY: Mr. Besso.

MR. BESSO: I am fine with it.

MR. BEARDSLEY: Ms. Smith.

MS. SMITH: Yes.

MR. BEARDSLEY: Ms. Simpson.

MS. SIMPSON: Yes.

MR. BEARDSLEY: Ms. Boje.

MS. BOJE: Yes.

MR. BEARDSLEY: Mr. Knapp.

MR. KNAPP: Yes.

MR. BEARDSLEY: Mr. Rubins.

MR. RUBINS: Yes.

[58] MR. BEARDSLEY: Mr. Murphy.

MR. MURPHY: Yes.

MR. BEARDSLEY: Now I am going to get to the tough stuff. Some people I know are uncomfortable awarding damages for pain and suffering. Some people have religious beliefs or background beliefs, or whatever, that are just uncomfortable in awarding for pain and suffering. I have friends that don't know. Then some people say, no, somebody went through what he went through, that, yeah, I can award a number; I can award money damages for pain and suffering. And I kind of need to know where people feel about that. Ms. Boje, are you closer to: I can't award for pain and suffering or closer to that you think you can under the right circumstances?

MS. BOJE: Money is not going to make everything better. I have never had a real attachment to money because it doesn't make me happy, so just because I am hurt and I suffered through this, it's not going to make

me feel better about that time. I am not going to be able to—yeah, I will go buy a car, or whatever; that doesn't make me better about it, so I don't know if I could see that side of things.

MR. BEARDSLEY: You are not sure?

MS. BOJE: No.

MR. BEARDSLEY: Okay. That's fair.

[59] Ms. Merritt, how do you feel about it? You closer to I can't award for pain and suffering or, yeah, I can award for pain and suffering?

MS. GILBY-MERRITT: Yeah.

MR. BEARDSLEY: You think you can?

MS. GILBY-MERRITT: Yes.

MR. BEARDSLEY: Mr. Knapp, how do you feel?

Every time I call on you, you just smile at me. What do you think? Closer to I can't do it or closer to yeah, I think there probably is some I could award?

MR. KNAPP: Probably so.

MR. BEARDSLEY: Mr. Rubins, how about you?

MR. RUBINS: Closer to I can.

MR. BEARDSLEY: Mr. Murphy?

MR. MURPHY: Yeah.

MR. BEARDSLEY: Mr. Zandstra.

MR. ZANDSTRA: Some.

MR. BEARDSLEY: Mr. McCamly?

MR. MCCAMLY: I believe some.

MR. BEARDSLEY: Ms. Lemmel?

MS. LEMMEL: Yes.

MR. BEARDSLEY: Mr. Tripp?

MR. TRIPP: Yes.

MR. BEARDSLEY: Ms. Whitmyre. Now this time you are shaking your head no.

[60] MS. WHITMYRE: No. I just don't see if it was an accident and wasn't something done deliberate you've got to accept some responsibility. I don't feel somebody should have to pay because you just get your life going again. I have had things happen, too. You bite the bullet and get going again.

MR. BEARDSLEY: Does it make a difference to you that when the Court instructs that the cause of the collision doesn't have to be intentional and the cause of the pain and suffering does not have to be intentional that it can be a negligence or a carelessness, would that make a difference to you? Could you follow the law if the Judge said, no, it doesn't have to be intentional to consider pain and suffering?

MS. WHITMYRE: I will follow the law.

MR. BEARDSLEY: That's fair. I understand your feelings. Thank you.

Mr. Titus, how do you feel about pain and suffering? Closer to I can award it or closer to I can't?

MR. TITUS: I could award.

MR. BEARDSLEY: Mr. Besso.

MR. BESSO: I could.

MR. BEARDSLEY: Ms. Smith.

MS. SMITH: I could.

MR. BEARDSLEY: Ms. Simpson.

[61] MS. SIMPSON: I could.

MR. BEARDSLEY: Ms. Abdo.

MS. ABDO: I could.

MR. BEARDSLEY: Ms. Whipple.

MS. WHIPPLE: Yes.

MR. BEARDSLEY: Mr. Guthrie.

MR. GUTHRIE: Yes.

MR. BEARDSLEY: Now that I tried to mix it up I don't know if I got everybody. Did I miss anybody on that issue?

MR. GOODWIN: Yeah, me.

MR. BEARDSLEY: I'm sorry. And you kind of told me I think earlier, but what do you think about pain and suffering?

MR. GOODWIN: Yeah, I'd pay for it.

MR. BEARDSLEY: Thanks. I'm sorry. Anybody else? Thank you.

This is an important case. It's important for a lot of reasons because it has to do with rules of the road, it has to do with how you drive trucks, how you drive motorcycles, and it will make a difference. And there may be media coverage; there may be, I don't know. There may be coverage because we are asking for a substantial sum. And some people don't want to be put in a spot where they have to make such an important decision. If you would [62] raise your hands, all of you, if you are comfortable making this important decision on this case. Can you do that? Mr. Guthrie, Mr. Goodwin, and Ms. Boje. Mr. Goodwin, you are uncomfortable doing this?

MR. GOODWIN: To an extent.

MR. BEARDSLEY: And does it go back to your own experience or something else?

MR. GOODWIN: Goes back to my own experience.

MR. BEARDSLEY: And you just sit here and have concerns for making such an important decision?

MR. GOODWIN: Yes.

MR. BEARDSLEY: Thank you. Mr. Guthrie, did we talk about it earlier when we were talking about the greater convincing force or is it something else?

MR. GUTHRIE: Pretty much along those lines. I don't believe I am comfortable trying to decide something who is liable.

MR. BEARDSLEY: That's fair. I'm glad you are talking. It's hard to come to a spot where you've never been on a jury and all of a sudden some attorneys are asking you questions and you got to volunteer in front of a whole group. I appreciate your comments. You are speaking from the heart; that's what we need.

Ms. Boje, was it the concern you talked about earlier or is it something else?

[63] MS. BOJE: No, it's the same with the motorcycle; it's how I feel that it really could be their fault, motorcycle's fault; and in this instance, at least with the facts that I was given so far.

MR. BEARDSLEY: And that's your concern because it's an important case and you're just not sure yet?

MS. BOJE: Yeah.

MR. BEARDSLEY: Thank you.

THE COURT: Mr. Beardsley, we are going to take a 10-minute recess. If you are serving as jurors in the case—we will work through this together—we will take a break about every hour and a half. Our court reporter has an intense job following the testimony and writing down every word, but also just to get a stretch and to clear your minds and to take a break, I think it's important and good for everyone to have that opportunity.

Now, those of you who are in the gallery and not sitting in the jury box, any one of you could be selected as a juror in this case. So the instruction I am about to give applies to you as well as to you folks in the jury box. And

you will hear me give this instruction repeatedly if you sit on this jury.

You don't know anything about the case other than what you have heard this morning, and so it would be very inappropriate to form any opinions; to have any conclusions [64] at all about the case. And so this is a kind of recess instruction that you will hear regularly during the course of the case, but it applies to you now. Everyone has taken the oath to participate in jury selection and to fairly answer these questions. So during this recess, you must not discuss this case with anyone, including other jurors. You cannot talk to members of your family, people involved in this trial, or anyone else. If anyone tries to talk to you about this case during this recess, please let me know about it immediately. I know that many of you use cell phones, e-mail, I-phones, text messaging, Twitter, Blackberries, the Internet, and other tools of technology including social networking tools like Facebook, MySpace, U-Tube. You must not talk to anyone about the case or use any of these tools of technology to communicate electronically with anyone else during this recess. Do not read, watch, or listen to any media or information during our break. Do not conduct any research about the case or anything that you heard so far. And please keep an open mind until all the evidence has been received and you have heard the views of your fellow jurors, if you are selected as a juror in the case.

So at this point we will take a 10-minute recess. And during that time make yourselves comfortable. And again, please do not discuss the case with anyone in any [65] way.

We are in recess.

(Recess taken.)

THE COURT: Mr. Beardsley, you may continue.

MR. BEARDSLEY: Thank you. How many people—raise your hand—ever ride a motorcycle? I was afraid of that. How many people in the last five years have ridden a motorcycle? Some of you stopped, apparently. We have a motorcycle rider and we have in Rapid City and Sturgis and all the Black Hills, the Rally. And this was just prior to the Rally. What I want to inquire about is a couple things: the motorcycle experience, but also all that noise. Anybody have problems with people that ride motorcycles, all the noise and the pain in the rear when we have to deal with motorcycles everywhere? Some people have very strong feelings about the Rally and then that transfers into people that ride motorcycles. Mr. Murphy, I noticed you raised your hand you used to ride a motorcycle. Do you have any problem with the Rally and the whole change of sound and atmosphere when they are here?

MR. MURPHY: Not really. It's gotten better since all of the Civic Center activities got moved north.

MR. BEARDSLEY: That's true.

MR. MURPHY: Lot less traffic.

MR. BEARDSLEY: Mr. Rubins, how do you feel about [66] the Rally? You didn't raise your hand on motorcycles.

MR. RUBINS: No. It doesn't bother me at all. I don't ride a motorcycle. I don't go.

MR. BEARDSLEY: Don't going to concerts or anything?

MR. RUBINS: No.

MR. BEARDSLEY: How many people here have actually been to the Rally at Sturgis? Me, too. It's kind of a carnival, actually. And I don't mean to repeat myself but, you know, I know that some people don't like motorcycles and they think there is too many of them; do something wrong. Anybody here—and I am not going to go through everybody—you kind of sit back and go no, they are a pain and I wish they'd never come and I don't like them. And it's fair.

MS. WHITMYRE: I am probably one of them.

MR. BEARDSLEY: There you go. I knew there had to be one. What in particular?

MS. WHITMYRE: I just don't like the crowd, I don't like the noise, I don't like their attitude.

MR. BEARDSLEY: Other than that? That pretty much covered it. No, that's fair. Now, the testimony will be Mr. Warger was in the Navy for five years, Naval Reserves for 20; he's not full of tattoos, or anything like that. Can you disassociate [67] your feelings about the Rally to Mr. Warger who came to visit the Rally? Can you do that?

MS. WHITMYRE: Oh, sure. A lot of people like the Rally. I am just not one of them.

MR. BEARDSLEY: All parts of it. Okay. That's fair. I appreciate it. Anybody else feel that way about the Ral-

ly? Because it can be annoying. I mean, each day the noise kind of rumbles. Anybody else kind of have strong feelings about that? How about motorcycles in general; anybody think, you know, somebody cut in front of me one time, or didn't look, or they're zooming in and out, or going too slow. Anybody got a problem with motorcycles in general? Ms. Lemmel, how many times have you been at the Rally?

MS. LEMMEL: I stay out of town most of the time. I live on the side of the hill up there and they go up and down the Interstate and I watch them all night and all day.

MR. BEARDSLEY: But you went up to the Rally?

MS. LEMMEL: I go shopping before everybody gets there.

MR. BEARDSLEY: Then you just watch them from above?

MS. LEMMEL: Yeah. They go all night long, steady.

[68] MR. BEARDSLEY: Now, the other thing I was going to ask is how many people—what we have involved here is a truck pulling a 28 or 30-foot trailer. Anybody here regularly pull trailers? Anybody here ever pulled trailers? Anything about the fact—strike that. Anybody here own large trailers?

MS. LEMMEL: Horse trailers, or—? I don't have a huge one, but—.

MR. BEARDSLEY: Well, where I am going is the defendant was in a truck and a pull trailer that was 28, 30

feet long. And I am just wondering if your experience in pulling trailers makes you feel like Mr. Warger starts out behind the eightball because I have experience pulling trailers and I feel stronger for the guy pulling the trailer than the motorcycle. So Ms. Whitmyre, you pulled trailers?

MS. WHITMYRE: (Nodding.)

MR. BEARDSLEY: Anything like, well, I am on the side of the guy that was pulling the trailer versus the other side?

MS. WHITMYRE: No.

MR. BEARDSLEY: It sounds like a silly question, but people get associated with what they do. Mr. Titus, how about you?

MR. TITUS: Yes, I have pulled a fifth wheel and [69] flatbed.

MR. BEARDSLEY: How long have you had that? Are they yours?

MR. TITUS: Yes. Still have a fifth wheel; don't have a flatbed.

MR. BEARDSLEY: Do you regularly go on vacation and pull a fifth wheel?

MR. TITUS: Pull one occasionally.

MR. BEARDSLEY: Okay. Any affinity for that side because we have a truck and trailer involved like you have a truck involved?

MR. TITUS: No.

MR. BEARDSLEY: Ms. Lemmel, how about you and the horse trailer?

MS. LEMMEL: Watch the other end.

MR. BEARDSLEY: Okay. Anybody else pull trailers? Mr. Rubins.

MR. RUBINS: Just in the military.

MR. BEARDSLEY: How long were you in the military?

MR. RUBINS: Nine years.

MR. BEARDSLEY: What branch?

MR. RUBINS: Air Force and Army.

MR. BEARDSLEY: Is that how you got to Rapid City—to Ellsworth?

[70] MR. RUBINS: Yes.

MR. BEARDSLEY: And then you decided to stay?

MR. RUBINS: Yes.

MR. BEARDSLEY: Mr. McCamly, you work for Federal Express, but you don't drive truck? Big trucks, but not trailers?

MR. MCCAMLY: No trailers.

MR. BEARDSLEY: No trailers, just big trucks. And you do that—is that your daily or are you in some other capacity?

MR. MCCAMLY: No, I carry for Fed Ex.

MR. BEARDSLEY: Okay. And how long have you been with Fed Ex?

MR. MCCAMLY: Ten years.

MR. BEARDSLEY: I think testimony is going to be from Mr. Shauers he has association or works for Federal Express. You might be judging someone that actually works for Federal Express. Can you do that?

MR. MCCAMLY: Yes.

MR. BEARDSLEY: The fact that you both are employed by the same company going to make any difference to you?

MR. MCCAMLY: No.

MR. BEARDSLEY: Thank you. But you just drive regular solid trucks without a full trailer?

[71] MR. MCCAMLY: Yes. Currently just a van; just a small van for the route that I have. It's a small route.

MR. BEARDSLEY: But you have done the bigger trucks?

MR. MCCAMLY: Yes.

MR. BEARDSLEY: Anything about that that's going to make a difference here, because we have a truck-trailer versus running into a motorcycle?

MR. MCCAMLY: Not at all.

MR. BEARDSLEY: So when you are doing your route during the Rally, how annoying are motorcycles?

MR. MCCAMLY: They make you more aware – you need to be more aware; you need to be a lot more cautious. There's so many more blind spots you got to be aware of your surroundings. Just common practice.

MR. BEARDSLEY: Okay. Thank you. I mentioned that Mr. Warger lost his leg, and I am assuming there's no one here with a loss of limb that I could detect. Anybody have a close family friend or family member that had lost a limb? Mr. Knapp, who is that?

MR. KNAPP: My cousin.

MR. BEARDSLEY: Leg or arm?

MR. KNAPP: Leg.

MR. BEARDSLEY: Does he have a prosthetic leg?

MR. KNAPP: Uh-huh.

[72] MR. BEARDSLEY: So it's been 40 years, probably. It's been a long time?

MR. KNAPP: Yes.

MR. BEARDSLEY: He's had to deal with that leg. And your—I'm sorry, your relationship; your brother, or—?

MR. KNAPP: Cousin.

MR. BEARDSLEY: How well do you know your cousin? Are you close?

MR. KNAPP: I see him every once in a while.

MR. BEARDSLEY: Ever seen him take his leg on and off?

MR. KNAPP: Yeah.

MR. BEARDSLEY: Do you know what he goes through?

MR. KNAPP: Yeah.

MR. BEARDSLEY: Ladies and gentlemen, Mr. Warger is going to show you that because we believe it's important that you see what he has to go through every day and sometimes multiple times in a day. Anybody sitting here think the jury shouldn't see that? To us it's real life; that's what he deals with every day. You kind of need to see it to understand it. How was it that you saw it? I mean, he just showed it to you? You asked him, or—? I mean, a long time ago.

[73] MR. KNAPP: I see him every once in a while and he takes it on and off.

MR. BEARDSLEY: Anything about your cousin's experience in what you've seen make a difference in trying to judge this matter?

MR. KNAPP: No.

MR. BEARDSLEY: What does he do for a living?

MR. KNAPP: He works for the railroad.

MR. BEARDSLEY: In a supervisory capacity?

MR. KNAPP: No, as a brakeman.

MR. BEARDSLEY: As a brakeman with an artificial leg?

MR. KNAPP: Uh-huh.

MR. BEARDSLEY: Mr. Warger is a computer maintenance man for a large company, Enterprise Rental Company, and has returned to his work. We will talk about his employment. He also has to get in and crawl; they have great big walls of computers, apparently, and he has to go sometimes down underneath. I assume that your cousin also is active as a brakeman?

MR. KNAPP: He's active, yeah.

MR. BEARDSLEY: Anybody else have a close friend or relative that has lost a limb and they just had to deal with it and you have observed it? Yes, Mr. Goodwin.

MR. GOODWIN: My grandpa lost his thumb; it was [74] in a farming accident.

MR. BEARDSLEY: Okay. And he doesn't have a prosthetic; he kind of just goes without a thumb?

MR. GOODWIN: Yes.

MS. WHITMYRE: My cousin's son lost a limb in a car wreck that put him in a wheelchair.

MR. BEARDSLEY: He's still in a wheelchair?

MS. WHITMYRE: Yes. Since he was 16 years old; he went on to fly an airplane.

MR. BEARDSLEY: Anything about that experience that would affect your—

MS. WHITMYRE: No. I am close to him; I see what he goes through; getting himself in and out of his chair and everything he does.

MR. BEARDSLEY: Mr. Warger hasn't accomplished it yet, but one of the first questions he asked the doctor when he got out of surgery was, "Can I play ice hockey again?" He hasn't gotten that done. He has another prosthetic and that's a running prosthetic that he's tried and he's going to explain how difficult that is for him. Really a tough deal, and the falls. Anybody else have some close relative or friend that lost a limb? Yes, Ms. Smith.

MS. SMITH: My husband lost his five fingers in a sawing accident.

[75] MR. BEARDSLEY: How long ago was that?

MS. SMITH: In his twenties.

MR. BEARDSLEY: And you have seen the effect?

MS. SMITH: Uh-huh. He's left-handed, but he says the only time he really needs them is when he's lifting

heavy stuff. He does pretty good with it. I mean, they are off like this.

MR. BEARDSLEY: He doesn't use an excuse so that you have to do things for him?

MS. SMITH: No.

MR. BEARDSLEY: It doesn't work. Anybody else deal with people or know close friends that have lost a limb? Any one here deal with or have close friends or relatives that deal with chronic pain? It's a daily pain that people have to deal with all the time.

MS. LEMMEL: My daughter.

MR. BEARDSLEY: Was it an accident?

MS. LEMMEL: No.

MR. BEARDSLEY: I am not going to get into the specifics, but it's something that you help her with?

MS. LEMMEL: No; she's out in Cheyenne. She has Lupus. That is a lot of pain.

MR. BEARDSLEY: Sure. It's a fatigue, too, dealing with every day.

[76] MS. LEMMEL: Yeah.

MR. BEARDSLEY: Anybody else dealt with people that are close to them that have chronic pain? Yes, Mr. Knapp.

MR. KNAPP: My wife is a polio survivor.

MR. BEARDSLEY: Long time ago, I suppose.

MR. KNAPP: When she was two.

MR. BEARDSLEY: She has not just a disability, but she has pain from that?

MR. KNAPP: Uh-huh.

MR. BEARDSLEY: So you have observed that?

MR. KNAPP: (Nodding.)

MR. BEARDSLEY: Anyone else?

MS. SMITH: Sister-in-law has MS.

MR. BEARDSLEY: And has it progressed to the point where it's—

MS. SMITH: Yeah, she's bedridden. She's in a nursing home the last 10 years.

MR. BEARDSLEY: We are going to talk about the pains that Mr. Warger has and the medical issues. And all you can be is fair about it when we talk about pain and suffering. Do you think you can—because MS is not something caused by somebody else. It's another matter. Can you disassociate that?

MS. SMITH: Yes.

[77] MR. BEARDSLEY: Mr. Knapp, can you do that, too?

Were you nodding?

MR. KNAPP: Yes.

MR. BEARDSLEY: Thank you. There's a natural sympathy when somebody gets hurt. And we are not here about sympathy, we are here about fair compensation and so that needs to be understood. Mr. Warger is a fighter; he's fighting a comeback. And is everyone comfortable we are not awarding damages because of sympathy, we are awarding damages because of fair compensation that's required. Everyone is kind of nodding with me on that?

Ladies and gentlemen, I know you are going to find this hard to believe, but I can stand up here all day and ask you questions. Here is the bottom line, then I am going to sit down. The bottom line is is there anything that's come up, is there any topic that you thought of since we started, other than the one we talked about, that you now have concluded, you know, I don't think I could be a fair and impartial juror on this kind of case. I know it's kind of a general question, but this is your time to raise your hand and say, "I just don't think I can do this." Other than what we have talked about, anybody here have anything that you are sitting here going, "Geez, I just don't think I could be fair"? Thank you. Thank you very much. [78] Your Honor, I would pass this jury for cause.

THE COURT: Very well, Mr. Beardsley. Mr. Kappelman, are you conducting voir dire?

MR. KAPPELMAN: Yes, Your Honor.

THE COURT: You may begin, sir.

VOIR DIRE EXAMINATION

MR. KAPPELMAN: Good morning, ladies and gentlemen. I am Ron Kappelman. I was previously introduced to you. I want to thank you very much for being here and for being willing to take the amount of time that's necessary to decide this. You have heard a little bit about this. This lawsuit involves an accident that happened up on the intersection of Highway 385 and Sheridan Lake Road and happened on August 4, 2006. My client, Mr. Shauers, was driving a pickup pulling a 28-foot travel trailer. He was going south on Highway 385. Mr. Warger was driving a Harley Davidson motorcycle; he was making a left turn from Sheridan Lake [illegible]ad on to 385. Then he was going to turn back on to 385—excuse me. He made a left-hand turn from Sheridan Lake Road on to 385, then he was going to turn right back on to Sheridan Lake Road where he just pulled out from. Does any of that jog your memory about every hearing about an accident like that?

Each party—that would be Mr. Warger and Mr. Shauers—claims that the other person caused the [79] accident. That is what your job is going to be here; that is why we are here is to determine what caused this accident. Does anybody not understand that that's what this lawsuit is about, at this point?

Mr. Beardsley talked a lot about the damages, a lot about prosthetic legs; but do you all understand that this case is about who caused this accident? Is there anybody here that would have any problem in rendering a decision about who caused the accident?

Mr. Beardsley asked you if you'd have a problem in returning a verdict for a substantial sum of money for

Mr. Warger, and most of you said I wouldn't be adverse to that. But on the other hand, I want to ask this question: if you determined Mr. Warger caused the accident, not my client, Randy Shauers, if you determined that Mr. Warger caused the accident by pulling on to 385 as Randy was coming down the highway and that Mr. Warger failed to yield for Randy Shauers and caused the accident, would any of you have a problem in finding for my client, Randy Shauers, in telling Mr. Warger he's not entitled to any damages? Ms. Abdo, how do you feel about that? Let me explain before I start asking you all this particular question.

Lawsuits are in two phases. Okay. First of all, there's the issue of liability; who caused the accident. All right. You never get to how much a person gets for [80] damages until you answer the first question: who caused the accident? So in this particular case, the largest and greatest issue for you to decide is who caused the accident, and if you decide Mr. Shauers did not cause the accident, it was caused by Mr. Warger, then you never get to how much money the man gets, so we never get to the idea of pain and suffering, loss of enjoyment of life, future medical expenses, past medical expenses. Do you understand that, Ms. Abdo, that that's what's going on here and do you have a problem with that?

MS. ABDO: No, I don't.

MR. KAPPELMAN: Would you, first of all, make Mr. Warger prove that Mr. Shauers actually caused the accident before you are going to make a jump to: I am going to give Mr. Warger money. Would you make him prove that Randy Shauers, my client, actually caused the accident before you make the jump to: I am going to talk about money? And obviously that's very important in

this case. Do you see what I am saying? One could assume for Mr. Beardsley's examination, and we are not even talking about who caused the accident, but we are talking about who caused the accident; that's why we are here. We are not arguing Mr. Warger didn't lose his leg; that's obvious; he did lose his leg. He had serious injuries. We are not here to argue about that. We are here to argue about and [81] to contest who caused the accident. So all I am saying is would you be willing to make Mr. Warger prove to you to your satisfaction that Randy Shauers did something wrong to cause this accident before you would jump into damages?

MS. ABDO: (Nodding.)

MR. KAPPELMAN: I know you said that you had a similar type of—was it your husband that—was he killed?

MS. ABDO: Yes.

MR. KAPPELMAN: I'm sorry to hear that. Was that a long time ago?

MS. ABDO: Eleven years.

MR. KAPPELMAN: Was it in a motor vehicle accident?

MS. ABDO: Yes. The man that ran over my husband was in a dump truck and my husband was the dump director, so he wasn't in a vehicle that day.

MR. KAPPELMAN: Okay. Did you have to have a lawsuit to decide who was at fault who caused the accident?

MS. ABDO: I think from the highway patrol report it just right off deemed it an accident and so there weren't any criminal charges filed. Just a wrongful death suit.

MR. KAPPELMAN: What I am getting at: was there any issue about—apparently your husband didn't have any [82] fault in the accident so that's why you went right to how much money is owed, right?

MS. ABDO: Well, yeah.

MR. KAPPELMAN: And you—it was the estate received money for that death?

MS. ABDO: Uh-huh.

MR. KAPPELMAN: Okay. I need to ask you, Ms. Boje, based upon your answers to some of Mr. Beardsley's questions I am a little bit concerned. Because I heard you say that you tend to favor motorcycle drivers.

MS. BOJE: Uh-huh.

MR. KAPPELMAN: I got the impression that it really didn't make much difference to you. You are probably going to think that Mr. Warger should get some money here.

MS. BOJE: Yeah.

MR. KAPPELMAN: Without even hearing witness one come to the stand.

MS. BOJE: In the case it was an accident, being a rider myself, I know what it takes. I have driven vehicles, cars, trucks, pickup trucks, since I was 14 years old. I lived in Kadoka. So driving various, you know, back

roads and things. So I have experience doing both. But just as a motorcycle rider, especially when you are not on your own road, if you are going to a different—I have [83] ridden to Minnesota and I have to be even more careful because I don't know exactly where I am going; I don't know, so I have to be very aware of my surroundings. So to say that it would be his fault is very hard for me to believe. Very hard.

MR. KAPPELMAN: Well, what it sounds like, ma'am, is that we are not starting on an equal playing field with you, you know what I am saying? You are already tending to favor Mr. Warger's side of the case and you haven't heard any witnesses, right?

MS. BOJE: Yes.

MR. KAPPELMAN: Well, would you agree with me this is probably not the right case for to you sit on?

MS. BOJE: Probably not.

MR. KAPPELMAN: I challenge the juror for cause, Your Honor.

THE COURT: Any voir dire, Mr. Beardsley?

MR. BEARDSLEY: Yes, Your Honor. I don't wish to belabor this, but we brought it up earlier. I asked if you believed that you could be fair and listen to the evidence. And I may be wrong, but I thought you said, "Yeah, I think I can and listen to the evidence and come to"—

MS. BOJE: What I said was I like to think I can.

MR. BEARDSLEY: That's really all that can be [84] asked of you. You would try your best to do that?

MS. BOJE: I would try.

MR. BEARDSLEY: And like to think you could do that?

MS. BOJE: I would love to think so.

MR. BEARDSLEY: Your Honor, I would resist the cause motion.

THE COURT: Having heard you are struggling with the questions you are doing the best you can. But I think Mr. Kappelman is right, I think you are probably a great juror for another case, not this one because of your expe-riences. I very much thank you for your service. You have been very responsive, all the jurors. This is very helpful. Ms. Boje, I will excuse you for cause. Jeana, call our next juror, please.

DEPUTY CLERK OF COURT: Next juror is Carolyn Scheler.

THE COURT: May I ask a couple questions, Mr. Kappelman?

MR. KAPPELMAN: Absolutely, Your Honor.

THE COURT: Good morning. Have you heard all of the questions asked of the jurors so far?

MS. SCHELER: Yes.

THE COURT: I promised you that one of you would be selected after being so patient working through this [85] with us. Is there any question which has been asked to this point which would cause to you think that you

wouldn't be a fair and appropriate juror to hear this case?

MS. SCHELER: No, there isn't.

THE COURT: All right. Mr. Kappelman, you may proceed.

MR. KAPPELMAN: Thank you, Your Honor. I suppose I should first of all ask, you know, Mr. Beardsley asked a lot of questions and I am going to ask a few questions myself. Let's talk about anything that he may have asked the rest of the jurors if you have any particular responses that you think we should know about, realizing that we are trying to get 12 fair and impartial people here who don't have their mind made up before we ever start.

MS. SCHELER: Okay. I am going to do a little history knowing individuals. I worked with Mr. Strommen at a previous position and Mr. Beardsley's law firm is legal counsel for the corporation that I work for now.

MR. KAPPELMAN: Which is Black Hills Corporation?

MS. SCHELER: That is correct. But I have not had any dealings with Mr. Beardsley. Gary Jensen.

MR. KAPPELMAN: Now, I guess the basic question there would be given your relationship with Gary Jensen, do you think that you are going to go into this case with a [86] preconceived idea that maybe Mr. Warger should somehow prevail without hearing any witnesses?

MS. SCHELER: No. This is totally different law.

MR. KAPPELMAN: You worked with Mr. Strommen?

MS. SCHELER: Correct.

MR. KAPPELMAN: So you worked for Costello Porter. And how many years ago was that?

MS. SCHELER: Two.

MR. KAPPELMAN: Two years ago. Had you ever worked for Mr. Strommen?

MS. SCHELER: Just like some extra typing or anything he might need when his secretary was unavailable.

MR. KAPPELMAN: Who was your main person you worked for?

MS. SCHELER: Was Heather Lammers-Bogard and Joe Lux. I have sat in trial and assisted Ms. Bogard.

MR. KAPPELMAN: So you know this process. And were those civil trials like this?

MS. SCHELER: Yes.

MR. KAPPELMAN: Do you have any problem hearing what you heard so far about what we are going to be talking about what actually caused this accident; was it Mr. Warger was it Mr. Shauers; is that going to be any issue for you here?

MS. SCHELER: No, it's not.

[87] MR. KAPPELMAN: Think you could do that?

MS. SCHELER: Yes, I can.

MR. KAPPELMAN: Let me also ask—I'll be back talking ag.in.

THE COURT: Mr. Kappelman, if you are concluded with Ms. Scheler, we will permit Mr. Beardsley to also voir dire this witness who has replaced a prior juror. Mr. Beardsley, if you wish to inquire of Ms. Scheler?

MR. BEARDSLEY: Thank you, Your Honor. If everyone up here thinks I am going to go through every question again, I am not going to. And you work for Mr. Helmers now?

MS. SCHELER: Yes, I do.

MR. BEARDSLEY: How long did you work at Costello-Porter?

MS. SCHELER: I was there six years.

MR. BEARDSLEY: Mostly for Heather Lammers-Bogard?

MS. SCHELER: Correct.

MR. BEARDSLEY: And Heather and I have had lawsuits together; we call it together; we are on adverse sides, correct?

MS. SCHELER: That's correct.

MR. BEARDSLEY: Anything about that experience that would make you think I don't like their side, I don't [88] like Mr. Beardsley, or—?

MS. SCHELER: No, there's not.

MR. BEARDSLEY: Did I ever talk to you on the phone?

MS. SCHELER: I don't believe we did.

MR. BEARDSLEY: So there wasn't any direct contact we have ever had?

MS. SCHELER: I do not believe so.

MR. BEARDSLEY: You understand we are on the plaintiff's side, they are on the defense's side; Heather does mostly defense litigation?

MS. SCHELER: Correct.

MR. BEARDSLEY: Now she's up in Spearfish, right?

MS. SCHELER: Part-time, I believe.

MR. BEARDSLEY: Yeah. After a while if you work on the defense side, you kind of have a defense feel. Do you have a concern about if we prove our case by a greater convincing force, how do you feel about awarding damages?

MS. SCHELER: If you can prove the case, then he's entitled to damages.

MR. BEARDSLEY: How do you feel about awarding—how do you feel one way or another about awarding for pain and suffering?

MS. SCHELER: I am really not sure. I'd have to hear the case first.

[89] MR. BEARDSLEY: How about medical expenses?

MS. SCHELER: If you can prove it on that.

MR. BEARDSLEY: On liability.

MS. SCHELER: Correct.

MR. BEARDSLEY: How about future medical expenses?

MS. SCHELER: If you can prove it.

MR. BEARDSLEY: That's fair. How about loss of enjoyment of life?

MS. SCHELER: Probably going to hear the case on that.

MR. BEARDSLEY: But you are open?

MS. SCHELER: That's correct.

MR. BEARDSLEY: How long have you been a legal secretary?

MS. SCHELER: 18 years.

MR. BEARDSLEY: What other firms have you been in?

MS. SCHELER: I was with Brown Andrews in Casper, Wyoming.

MR. BEARDSLEY: What kind of firm is that?

MS. SCHELER: They do a lot of contract—a lot of oil and gas; civil.

MR. BEARDSLEY: When you came here you went to Costello-Porter?

[90] MS. SCHELER: Yes.

MR. BEARDSLEY: From there to Black Hills Corporation?

MS. SCHELER: Correct.

MR. BEARDSLEY: Do you want to do this?

MS. SCHELER: Yes.

MR. BEARDSLEY: Mr. Helmers said, "Sure, go ahead?"

MS. SCHELER: I don't think he knows I am here today.

MR. BEARDSLEY: Oh, really. Okay. Do you want to do it because you have been kind of on the back and now you get might have a chance to see the inside of how a jury works?

MS. SCHELER: Yes.

MR. BEARDSLEY: Have you ever been in federal court on a particular side, or work with Heather, or were you just in state court?

MS. SCHELER: State court.

MR. BEARDSLEY: As we sit here now, anything that I have brought up that concerns you; you just kind of sat back there listening going, "I can't do that?"

MS. SCHELER: No, nothing.

MR. BEARDSLEY: Thank you. I will pass for cause, Your Honor.

[91] THE COURT: You are passing Ms. Scheler for cause?

MR. BEARDSLEY: Yes.

THE COURT: Thank you very much. Mr. Kappelman, you may resume your examination.

MR. KAPPELMAN: Thank you, Your Honor. I need to ask you, Ms. Scheler, if you determine that Mr. Warger caused this accident and not my client, Randy Shauers, by pulling on to 385 and failing to yield to Randy Shauers, would you have any problem telling Mr. Warger you are not entitled to any damages?

MS. SCHELER: No, I wouldn't have any problem.

MR. KAPPELMAN: Let me go to you, Mr. Goodwin. I also heard you say some things that are somewhat concerned to me and I want to make sure—maybe I didn't understand you correctly, but I want to make sure I did. I wrote down that you would be willing to give Mr. Warger money whether he proves his case or not. Of course, that would be of great concern to me.

MR. GOODWIN: Yes, I would.

MR. KAPPELMAN: I take it that that's because you got hurt in an accident?

MR. GOODWIN: But I—and I do not remember any of it.

MR. KAPPELMAN: Yeah, I know that. And I [92] appreciate that. I'm sorry. But you didn't get anything from your accident and you think you should have, and I am sure you should have; sounds like you should have, because you were just a passenger in the vehicle. You didn't cause the accident, right?

MR. GOODWIN: Right.

MR. KAPPELMAN: This doesn't sound like the type of case that probably—there are a lot of cases to be heard. I mean, this doesn't sound like maybe this is the ideal case for you to be on if you are going to go into this with the idea: I think this Mr. Warger should get some money no matter what happened. Would you agree with me?

MR. GOODWIN: Yes, I would agree.

MR. K[illegible]ELMAN: Would you rather not sit on this case for t[illegible] reason?

MR. GOODWIN: My honest opinion is I would like to stay on this jury. But for them reasons, I would probably not be the right juror.

MR. KAPPELMAN: You could not be fair to Mr. Shauers, my client, right?

MR. GOODWIN: Right.

MR. KAPPELMAN: I challenge the juror for cause, Your Honor.

THE COURT: Mr. Beardsley, do you wish to [93] inquire?

MR. BEARDSLEY: No, Your Honor.

THE COURT: I thank you for your service. You are excused, sir.

MR. GOODWIN: Thank you.

THE COURT: Jeana, call our next juror, please.

DEPUTY CLERK OF COURT: The next juror is Anne Fines.

MR. KAPPELMAN: Good morning, ma'am. Your Honor, would you prefer Mr. Beardsley examine first or do you want me to?

THE COURT: Well, let Mr. Beardsley examine first. Is that workable for you, Mr. Kappelman?

MR. KAPPELMAN: That's fine.

THE COURT: Let me ask you, Ms. Fines, have you heard all questions asked of the other jurors this morning?

MS. FINES: I have.

THE COURT: Any of the questions lead you to believe that you are not an appropriate juror for this case?

MS. FINES: Sitting here I am questioning whether I can sit. I have had—I didn't come with a doctor's excuse because I thought I could. I have a shoulder injury and to—I had knee surgery quite a while ago and I am experiencing a lot of discomfort today.

[94] THE COURT: This courtroom is very difficult if you sit in the benches for an extended period of time; it's very hard to sit there. The chairs in which the jurors are seated for service in a trial are much more comfortable. I don't want to minimize in any way your possible inability to sit through a trial of this length, but I just ask you to consider as you are sitting here now do you think that that is a better location for you in terms of your ability to serve?

MS. FINES: It's a better chair. But I said I didn't come here thinking I couldn't sit, so time will tell how bad the pain will get.

THE COURT: It's very difficult to understand for people who haven't been on a jury or working in a courtroom the rigors of sitting for extended periods. It's quite a physical undertaking. So I will let the attorneys ask questions of you. If you believe that your medical history causes a problem that you really cannot serve through potentially eight days of jury trial, I need to know that. At this point is your answer yes I can serve or no?

MS. FINES: I am willing to try it. I am willing to try it.

THE COURT: I appreciate your raising that. Was there any other question that would lead to you to believe that you would not be a fair and impartial juror in this [95] case?

MS. FINES: No.

THE COURT: Any other question which was asked that would not make you an appropriate juror for this particular case?

MS. FINES: No.

THE COURT: Thank you very much, Ms. Fines. I will let Mr. Beardsley make inquiry.

MR. BEARDSLEY: Thank you, Your Honor. I kind of feel every time I come up here everybody is thinking how long is he going to be? I appreciate your candor about your shoulder. Are you on medication?

MS. FINES: No, I am not. I didn't think it would bother me at all.

MR. BEARDSLEY: These are better chairs. The Judge is right, too, if you go a number of days it's a concentration thing and it can be long days. Would you be comfortable if during the trial you need to stretch, kind of letting one of us know so that the Judge can make a determination maybe everybody wants to stretch; it's probably a good idea. Just raise your hand and say, "If I could stretch?" Would that be all right, Judge?

THE COURT: It would be. Any of you who are selected as jurors just raise your hand and I will ask you because there are times when a person needs a break for any [96] reason or to stand up and stretch, so please feel free to do that. Would that work for you, Ms. Fines?

MS. FINES: Yes.

MR. BEARDSLEY: Or drink of water. Ms. Abdo is kind of coughing.

THE COURT: One of the glories of being selected as jurors is you will have bottles of water. What a benefit. So our arrangement is that if you, Ms. Fines, or any of you need to stretch during the course of the trial if you are selected as jurors, raise your hand, I will recognize you, and we will work from there. Go ahead.

MR. BEARDSLEY: So if we try to recognize that, would you like to do this? The word maybe not "like." Would you be willing to do this?

MS. FINES: Yes.

MR. BEARDSLEY: Have you ever sat on a jury before?

MS. FINES: No.

MR. BEARDSLEY: Have you ever been involved in any lawsuits?

MS. FINES: No.

MR. BEARDSLEY: Do you know—have you been involved or are close friends of somebody that has lost a leg?

MS. FINES: Yes.

[97] MR. BEARDSLEY: Or lost a limb of any kind?

MS. FINES: Yes. A person I haven't seen for a long time.

MR. BEARDSLEY: And most people can hear me. Sometimes the witnesses aren't as loud as I am. All of you kind of need to know you are free to raise—would you raise your hand and say, "I'm sorry, I can't hear that?" Do you have a hearing problem because every once in a while you kind of turn your head, like, what are you saying?

MS. FINES: I have a slight hearing problem.

MR. BEARDSLEY: Would you be comfortable though saying, "I'm sorry, I can't hear that?"

MS. FINES: I do that at home all the time.

MR. BEARDSLEY: It might be an interruption, but the jurors have to hear the evidence. And it takes some guts sometimes in a group like this to say, "Sorry, I can't hear." Would you be willing to bring that up to the Court?

MS. FINES: (Nodding.)

MR. BEARDSLEY: You said you did know someone that had lost a leg. Who was that?

MS. FINES: A student that I had many years ago lost his leg. He was one of my football players, one of my star students, lost his leg.

MR. BEARDSLEY: And what were the circumstances of him losing a leg? Was it a motor vehicle collision [98] or—?

MS. FINES: He was in a—you know, I can't remember. I just remember how he was.

MR. BEARDSLEY: You said you taught him. You were a teacher at one point?

MS. FINES: Uh-huh.

MR. BEARDSLEY: Do you teach anymore?

MS. FINES: No.

MR. BEARDSLEY: Where did you teach?

MS. FINES: That was at Revillo.

MR. BEARDSLEY: Revillo South Dakota?

MS. FINES: Yes, Revillo, South Dakota.

MR. BEARDSLEY: I am from Watertown. I know about Revillo. Would you be comfortable—that's a hearing assistance you can—

DEPUTY CLERK OF COURT: It's a microphone.

MR. BEARDSLEY: It's a microphone. It doesn't help hearing, it just helps when they talk. I think we do have some devices—does it amplify the hearing or is that just when you are playing the videos?

THE COURT: As far as I know what Jeana has done is hand Ms. Fines a lavaliere mic. If you speak into it, it will amplify your voice so our court reporter can hear you.

MR. BEARDSLEY: Jeana just mentioned there are some [99] hearing devices, too. Is that something that can be offered?

THE COURT: If they have them, it can be requested.

MR. BEARDSLEY: That might help, too. And you heard that this is an important case and that it's going to be an important decision. Are you comfortable being involved in that?

MS. FINES: Yes.

MR. BEARDSLEY: Do you understand that it involves a motorcycle and involves a truck and trailer, correct? You heard that? And I don't mean to—when you were sitting back there I don't know what the acoustics are, if you heard the questions. Did you hear most of the questions?

MS. FINES: Uh-huh.

MR. BEARDSLEY: Great. Any association of motorcycles that would bother you?

MS. FINES: Not that would bother me.

MR. BEARDSLEY: There was an explanation by Mr. Kappelman regarding 385 and Sheridan Lake Road that there's an exit, and then going down the road then there's another entrance coming back in on Sheridan Lake Road. And there's an area 100 to 125 feet before the turn back in. Are you familiar at all with that intersection?

[100] MS. FINES: No.

THE COURT: Ms. Fines, Jeana is going to give you a hearing device that you can use or not as you see fit.

MS. FINES: I am wired.

MR. BEARDSLEY: Good. Now I am a little afraid to speak up because I might blast you out, but you can hear through the device. Are you comfortable wearing that so you hear everything?

MS. FINES: We'll try it.

MR. BEARDSLEY: Okay. Whatever you are comfortable with. If you don't need it, don't use it. If you need it, use it. Okay? I was talking earlier with the others about some of the damages. If we prove our case that it was the responsibility of the truck driver not to run over Mr. Warger, would you be comfortable regarding the medical expenses that have been incurred today, awarding something like that?

MS. FINES: If the case is proven, yes.

MR. BEARDSLEY: Okay. And the future prosthetic devices that he will need for his lifetime, if we prove our case are you comfortable with that?

MS. FINES: Yes.

MR. BEARDSLEY: How do you feel regarding awarding for pain and suffering if someone—if we prove [101] our case, are you amenable to the concept and would you consider it as the Court will give you that option?

MS. FINES: Again, yes, if you prove the case.

MR. BEARDSLEY: As I said before, I not going to go through all the questions. Is there anything as you sit here today that jumps out at you and says, "You know, I

don't want to be involved in this. I don't think I can be a fair juror." Or do you feel you could be a fair juror, listen to both sides, and make a determination?

MS. FINES: I think I could be fair.

MR. BEARDSLEY: Your Honor, I would pass this lady for cause.

THE COURT: Pass the juror for cause, Mr. Beardsley. Thank you. Mr. Kappelman, you may—

MR. KAPPELMAN: Thank you, Your Honor.

THE COURT:—proceed again.

MR. KAPPELMAN: Thank you, Your Honor. Let me ask you, Ms. Whipple, if you were to determine Mr. Warger, the motorcyclist, caused the accident by pulling out into the 385 and failing to yield to my client, Randy Shauers, would you have any problem in telling Mr. Warger he's not entitled to any damages?

MS. WHIPPLE: No, I would not.

MR. KAPPELMAN: Okay. If you were to determine that Mr. Warger caused the accident by the way in which he [102] pulled on to 385 and then tried to turn back to Sheridan Lake Road where he just came from, but yet he still caused the accident by doing that, would you have any problem in saying to Mr. Warger, "You are not entitled to any money from Randy Shauers"?

MS. WHIPPLE: No, I would not.

MR. KAPPELMAN: You are willing to make them prove their case to you, right?

MS. WHIPPLE: Yes, sir.

MR. KAPPELMAN: Let me just say this: the bottom line here is if Mr. Warger caused the accident of Randy Shauers, would anybody have any problem in saying to Mr. Warger, "I'm sorry you lost your leg, but you are not entitled to any damages." Would anybody have a problem with that?

Let me mention another thing. As Mr. Beardsley said, Mr. Warger has the burden of proof today. He has sued my client, Randy Shauers, so he has the burden of proving that Randy Shauers caused the accident. If Mr. Warger fails to convince you that Randy Shauers caused the accident, would you have any problem saying to Mr. Warger: you failed to meet your burden of proof. Randy Shauers didn't do anything wrong and you are not entitled to any money. I will direct that question to you, Mr. Guthrie.

MR. GUTHRIE: What was the question, again?

[103] MR. KAPPELMAN: It was too long, wasn't it?

MR. GUTHRIE: Yeah.

MR. KAPPELMAN: The burden of proof. Remember, Mr. Beardsley was talking about burden of proof. Mr. Warger, the plaintiff here, has to prove to you by a greater convincing force of the evidence that Randy Shauers did something wrong. What I am asking you is if he fails in his burden of proof, if he fails to convince you that Randy Shauers did something wrong, he fails to meet his burden of proof, would you have any problem in saying to Mr. Warger, "You are not entitled to damages from Mr. Shauers?"

MR. GUTHRIE: I wouldn't have a problem. It seems like what we are here for.

MR. KAPPELMAN: Exactly. I need to make sure about this because a person can get kind of on this skewed idea of what we are really talking about if you only hear one side of the case. You only hear about one person's version of what happened, right? But the basics is that they have to prove their case. They have sued Mr. Shauers for damages. And would you make them prove their case to you, sustain their burden and show you by greater convincing force of the evidence that Mr. Shauers actually did something wrong that day before you give them money?

MR. GUTHRIE: Absolutely.

[104] MR. KAPPELMAN: Okay. What about you, Mr. McCamly, how does that sound to you?

MR. MCCAMLY: I agree that's what we are here for and hear the facts on both sides; decide what is correct.

MR. KAPPELMAN: Okay. And you are willing to make them prove their case to you, sustain their burden of proof?

MR. MCCAMLY: Yes.

MR. KAPPELMAN: In other words, show you by the greater convincing force of the evidence that my client, Mr. Shauers, actually did something wrong before you are going to start talking about damages?

MR. MCCAMLY: Yes.

MR. KAPPELMAN: That's only fair, isn't it?

MR. MCCAMLY: Exactly, yes.

MR. KAPPELMAN: There's a danger here when you are talking about a man who lost his leg that people would skip the first step and go to the second. I am just wanting to make sure that you are one of the people that would say: I heard the evidence here. I need to hear what happened on that day before I am going to go start talking about pain and suffering and many thousands of dollars.

MR. MCCAMLY: Yes.

MR. KAPPELMAN: Mr. Zandstra, how do you feel about that very issue making them prove that Mr. Shauers [105] did something wrong before you make the jump to let's talk about how much money this man might get?

MR. ZANDSTRA: I wouldn't have any problem.

MR. KAPPELMAN: Sound reasonable to you?

MR. ZANDSTRA: Yes.

MR. KAPPELMAN: Sound like maybe that's the way the system should work?

MR. ZANDSTRA: Right.

MR. KAPPELMAN: You understand there's a difference between liability who caused the accident and damages?

MR. ZANDSTRA: Correct.

MR. KAPPELMAN: And you never get to damages until you get past who caused the accident?

MR. ZANDSTRA: Yes.

MR. KAPPELMAN: And you would make them then sustain their burden of proof and prove to you that Mr. Warger—that my client, excuse me, Randy Shauers, did something wrong before you are going to talk about money?

MR. ZANDSTRA: Right.

MR. KAPPELMAN: Okay. What about you, Ms. Fines? I'd like to ask you the same question. And that is would you make Mr. Warger show you—sustain his burden of proof by a greater convincing force of the evidence that Randy Shauers did something wrong on August 4, 2006, before you [106] are going to start talking about awarding him money?

MS. FINES: Absolutely.

MR. KAPPELMAN: Okay. Yes, ma'am, how would you feel about that? Would you make them prove their case first before you talk about money?

MS. GILBY-MERRITT: Yes.

MR. KAPPELMAN: That sounds reasonable to you, doesn't it?

MS. GILBY-MERRITT: Yeah.

MR. KAPPELMAN: Only fair?

MS. GILBY-MERRITT: Have to hear the case first.

MR. KAPPELMAN: Would you make them do that?

MS. GILBY-MERRITT: Yes.

MR. KAPPELMAN: Do you go by Ms. Merritt, or—

MS. GILBY-MERRITT: Yes, Merritt.

MR. KAPPELMAN: Ms. Lemmel, would you make them prove their case first?

MS. LEMMEL: Uh-huh.

MR. KAPPELMAN: Before you start talking about money?

MS. LEMMEL: Right.

MR. KAPPELMAN: Make them show you that Randy Shauers actually did something wrong that day before you start talking about damages?

MS. LEMMEL: Right.

[107] MR. KAPPELMAN: What about you, sir, Mr. Tripp?

MR. TRIPP: All about the facts.

MR. KAPPELMAN: All about the facts; good point. It is all about the facts. We haven't heard any facts yet, have we?

MR. TRIPP: No.

MR. KAPPELMAN: That's the beauty of this. You are going to hear from the witnesses. Mr. Beardsley

talks and I talk and we try to select a fair jury; but what we say is not the evidence. The evidence comes from the witnesses. And so you are willing to sit here and listen to the witnesses and decide this case based on what they say, right?

MR. TRIPP: Correct.

MR. KAPPELMAN: And you would make Mr. Warger prove to your satisfaction, sustain his burden of proof and show you by the greater convincing force of the evidence that Mr. Shauers actually did something wrong on August 4, 2006, before you would make the jump to talking about money?

MR. TRIPP: Yes.

MR. KAPPELMAN: Sounds fair. Okay. Ms. Whitmyre, same question. Would you make them prove their case to you?

MS. WHITMYRE: Yes.

[108] MR. KAPPELMAN: Only start talking about money if they ever prove their case to you?

MS. WHITMYRE: Yes.

MR. KAPPELMAN: If they don't, if they cannot show by a greater convincing force from the evidence that Randy Shauers did something wrong out there that day, would you have any problem saying, "I'm sorry, Mr. Warger. I'm sorry you lost your leg, but you don't get any money because Mr. Shauers didn't do anything wrong?"

MS. WHITMYRE: No, I wouldn't have a problem with that. I don't feel someone should be awarded money because there was a wreck and they lost a limb or whatever.

MR. KAPPELMAN: Make them prove their case first?

MS. WHITMYRE: Yes.

MR. KAPPELMAN: Okay. Mr. Titus, how do you feel about that very issue? Obviously this is very important here. I want to make sure we are not jumping to conclusions before we get off the ground here.

MR. TITUS: They need to prove their case. Responsibility, the responsible party; go the next step.

MR. KAPPELMAN: You are willing to hold them to their burden of proof?

MR. TITUS: Certainly.

MR. KAPPELMAN: They are people that have to prove to you to your satisfaction Randy Shauers did [109] something wrong to cause this accident before you are going to start talking about awarding money, fair?

MR. TITUS: Yeah.

MR. KAPPELMAN: Mr. Besso, how does that sound to you?

MR. BESSO: I would let them prove their case.

MR. KAPPELMAN: Got to prove it to you first, right?

MR. BESSO: Yes.

MR. KAPPELMAN: If they don't prove it, if they don't meet their burden of proof, they don't show you Randy Shauers did anything wrong, would you have any problem telling Mr. Warger, "I'm sorry, you just don't get any money?"

MR. BESSO: No.

MR. KAPPELMAN: No problem at all?

MR. BESSO: No.

MR. KAPPELMAN: So they've got to prove the case first; got to prove Randy Shauers did something wrong and is liable to your satisfaction before we are going to talk about money?

MR. BESSO: Correct.

MR. KAPPELMAN: Okay. Ms. Simpson—sorry. I skipped Ms. Smith. Sorry, Ms. Smith. I'll get to you next, ma'am. How do you feel about this?

[110] MS. SMITH: They have to prove that he was in the wrong.

MR. KAPPELMAN: Okay. If the evidence shows that Mr. Warger failed to yield to Randy Shauers and the accident was actually Mr. Warger's fault, would you have any problem in telling Mr. Warger, "I'm sorry, you are not entitled to any money"?

MS. SMITH: I would not.

MR. KAPPELMAN: Now, Ms. Simpson, what's your reaction to this? What would be your response to my questions in this regard?

MS. SIMPSON: I'd like to look into the facts and decide from the facts who is at fault.

MR. KAPPELMAN: You'd make them prove their case first?

MS. SIMPSON: Yes.

MR. KAPPELMAN: You'd want to hear the witnesses testify first?

MS. SIMPSON: Yes.

MR. KAPPELMAN: If you hear those witnesses and those witnesses show you that Mr. Warger, the motorcyclist, failed to yield to my client, Randy Shauers, and Randy Shauers didn't do anything wrong except try to miss a guy who pulled out in the highway in front of him, would you have any problem in saying to Mr. Warger, "I am really [111] sorry about your loss, but you are not entitled to any money"?

MS. SIMPSON: Correct.

MR. KAPPELMAN: You wouldn't have problem with that?

MS. SIMPSON: No, I would not.

MR. KAPPELMAN: Ms. Scheler, am I saying that right?

MS. SCHELER: Correct.

MR. KAPPELMAN: How do you feel about what I am asking everybody else?

MS. SCHELER: I have got to hear both sides.

MR. KAPPELMAN: You have some legal experience?

MS. SCHELER: Uh-huh.

MR. KAPPELMAN: So you know a little bit more about the process than most of the folks here because you have had some legal experience?

MS. SCHELER: Correct.

MR. KAPPELMAN: You understand quite well that these lawsuits are two segments: liability and damages?

MS. SCHELER: Yes.

MR. KAPPELMAN: You understand the dispute here is about liability?

MS. SCHELER: Yes.

MR. KAPPELMAN: Who caused this accident, right?

[112] MS. SCHELER: Yes.

MR. KAPPELMAN: So if you determine that Mr. Warger pulled out in front of my client and failed to yield to him, Randy Shauers did everything he could to avoid this man who pulled out in front of him, would you have any problem in saying to Mr. Warger, "You are just not entitled to any money."

MS. SCHELER: No problem at all.

MR. KAPPELMAN: Mr. Knapp, what about you, sir?

MR. KNAPP: I don't think I would.

MR. KAPPELMAN: You ride motorcycle?

MR. KNAPP: Yes.

MR. KAPPELMAN: Is that in any way going to – I mean, as you sit here right now from what you have heard so far only from what you have heard right now, do you tend to think that, you know, I am a little more favorable to the motorcycle rider because I am a motorcycle rider and have been for 50 years, or however long it's been?

MR. KNAPP: No. I have seen motorcycles make mistakes; riders make mistakes on both sides. I have seen car drivers make mistakes.

MR. KAPPELMAN: You understand just because in a motorcycle wreck and you are on a motorcycle doesn't mean that you can't do something wrong? I mean, certainly you can fail to yield to people on a motorcycle, can't you, [113] just as well as with a car?

MR. KNAPP: Yes.

MR. KAPPELMAN: You can get confused on the highway and make a bad mistake?

MR. KNAPP: Yeah, there's some bad mistakes.

MR. KAPPELMAN: Sounds like somebody made a bad mistake on the accident you saw because there was a head-on collision.

MR. KNAPP: Yes.

MR. KAPPELMAN: What did you do, sir, before you retired?

MR. KNAPP: I was a mechanic for years; then I worked for DOT as a road painter.

MR. KAPPELMAN: That's where this accident occurred? I was thinking you must be working for the State of South Dakota when this happened.

MR. KNAPP: Yes, I was.

MR. KAPPELMAN: How long ago was that?

MR. KNAPP: I don't know the exact year. It was when I started working as a painter. I was a mechanic for the city; I worked 13 years for the state as mechanic for a few years, then I transferred to the paint crew and was painting. It was just before the Rally.

MR. KAPPELMAN: Just before the Rally. So there's a lot of motorcycles around.

[114] MR. KNAPP: Yes.

MR. KAPPELMAN: This was the motorcycle rider's fault?

MR. KNAPP: Well, in my opinion it was.

MR. KAPPELMAN: Would you make Mr. Warger prove to your satisfaction that Randy Shauers actually did something wrong out there on the day of this accident before you would award Mr. Warger some money?

MR. KNAPP: I believe I would.

MR. KAPPELMAN: You are not going to favor him because he's a motorcycle rider and you are a motorcycle rider? I mean, that's—I got to be honest. I mean, that would be a fear of mine for my client if you are a motorcycle rider that maybe you are going to identify more with him than you would with a fellow driving a truck pulling a 28-foot travel trailer.

MR. KNAPP: Depends on who made the mistake.

MR. KAPPELMAN: Would you need to hear the witnesses testify?

MR. KNAPP: Right.

MR. KAPPELMAN: Would you need to hear all of them testify; both sides?

MR. KNAPP: Yes.

MR. KAPPELMAN: And then make up your mind, fair?

MR. KNAPP: Fair.

[115] MR. KAPPELMAN: Okay. Mr. Rubins, you must work over at the Pennington County Jail?

MR. RUBINS: Yes, sir.

MR. KAPPELMAN: How long have you done that?

MR. RUBINS: About 10 years.

MR. KAPPELMAN: Before that were you in the military?

MR. RUBINS: Yes, sir.

MR. KAPPELMAN: What's your feelings about what I am asking the other jurors, that is, would you make them prove their case to you, sustain their burden of proof? They have the burden of proof if—they started this lawsuit, so they have to prove to your satisfaction that Randy Shauers did something wrong to cause this accident by a greater convincing force of the evidence. Would you make them do that?

MR. RUBINS: Yes, sir.

MR. KAPPELMAN: Do you have a problem with that?

MR. RUBINS: No, sir.

MR. KAPPELMAN: If the evidence shows you that Mr. Warger pulled out on to that Highway 385 and failed to yield to Mr. Shauers, pulled out so close to him that Randy Shauers couldn't do anything except swerve and try to miss him, would you have any problem telling Mr. Warger, "I'm sorry, you are just not entitled to any money because you [116] failed to yield to that vehicle coming down the highway"?

MR. RUBINS: No, sir, I would not.

MR. KAPPELMAN: The fact he lost his leg, would that be a determinative factor for you or would you be willing to make him prove the liability first before we're going to talk about liability?

MR. RUBINS: Liability first. I need to hear the facts.

MR. KAPPELMAN: Need to hear the facts. I would think as a military person you are going to be focused on facts.

MR. RUBINS: Yes, sir.

MR. KAPPELMAN: Thank you. Mr. Murphy, same question for you, sir. Would you make them prove their case before you start talking about money?

MR. MURPHY: Yes, but I am sure there's two sides of the coin as far as where the liability lies, so I am interested in hearing both sides of the story. For all I know, there might be shared liability. I don't know that. But I am willing to listen to the whole thing, then make a determination if there was shared liability as to who had the larger share of liability before we would award money.

MR. KAPPELMAN: So you would listen to the facts and listen to the witnesses?

MR. MURPHY: Yes.

[117] MR. KAPPELMAN: And make them prove that Randy Shauers actually did something to cause this accident before you would give Mr. Warger money?

MR. MURPHY: Yes.

MR. KAPPELMAN: That brings to mind another point, ladies and gentlemen. This case, as Your Honor has said, could last into next week. It might be done this week. But the way it will work is that Mr. Warger, Mr. Beardsley, and Mr. Jones put on their case first, and that will take probably the better part of three or four days. And Mr. Shauers doesn't put on any case until they are done because they have the burden of proving something here, okay. So we don't get to put on witnesses until they are all done. That could be four days from now. So my question to you is: are you all willing to withhold your judgment about how you think this should come out until you have heard all of the testimony, not just their side of what happened? Does that—what about you, Mr. Knapp? What I am getting at here, of course, is you listen to four days of testimony and all you hear is their side of the case, are you willing to withhold your judgment, not make up your mind until you have heard the whole case, not just their side?

MR. KNAPP: Yeah.

MR. KAPPELMAN: Does that makes sense?

[118] MR. KNAPP: Makes sense.

MR. KAPPELMAN: Okay. What about you Ms. Abdo, how does that strike you?

MS. ABDO: That would be the right way to do it; listen to both sides.

MR. KAPPELMAN: Are you willing to sit here and withhold your judgment about who should win and who should lose until you have heard everybody testify?

MS. ABDO: Yes.

MR. KAPPELMAN: Not jump to conclusions halfway through?

MS. ABDO: Yes.

MR. KAPPELMAN: Is that fair?

MS. ABDO: Uh-huh.

MR. KAPPELMAN: You seem hesitant, or are you?

MS. ABDO: Well, I was already under the impression that it was his fault when we came in here just from what I heard already, until you got up there and, okay, I understand more now.

MR. KAPPELMAN: I understand exactly what is happening. That's right. That's why we both get to ask you questions, and not just Mr. Beardsley, because one could assume from listening to him that Randy Shauers, what I was talking about, caused the accident, but we are, and that's the issue here. All right. Now you understand [119] that?

MS. ABDO: Yes.

MR. KAPPELMAN: So now that you understand that, are you willing to listen to all the witnesses now before—and, you know, and make a decision upon liability before we are ever talking about money, right?

MS. ABDO: Yes.

MR. KAPPELMAN: You have to hear all the witnesses for that, right?

MS. ABDO: Yes.

MR. KAPPELMAN: Their side and our side?

MS. ABDO: Uh-huh.

MR. KAPPELMAN: Okay. Mr. Beardsley brought this up and I want to bring it up as well; this is the idea of sympathy. The Court is going to instruct that sympathy is not to have any part of how you decide this case. Now, we know that Mr. Warger was seriously injured; we know that he lost a leg, and we know that he seriously injured his shoulder and everyone feels badly about that, including myself. But that is not what this case is about. This case is about who is right, who is wrong; who caused the accident and who didn't cause the accident. So I need to make sure that you folks are not going to decide this case based on the fact that you have sympathy for Mr. Warger. So Ms. Abdo, what—see, this is—I mean, this is real [120] stuff. We all have sympathy. How could we not, right?

MS. ABDO: Right.

MR. KAPPELMAN: Man lost his leg. But the Court will say sympathy is not to have any part of how you decide this case, period. Can you do that?

MS. ABDO: I really don't think so. I mean, I could say I could do it, but knowing the way that I am I always would have sympathy.

MR. KAPPELMAN: Right. And, of course, in that manner you wouldn't be fair to my client, would you?

MS. ABDO: No, I wouldn't.

MR. KAPPELMAN: I appreciate that. That's why we are having this conversation because this very well may not be the right case for you. You know, not everybody – this is not a cookie cutter sort of a thing where every person gets the nice mold that they should sit on a particular case. Do you think based upon the fact that you are going to feel sympathetic for Mr. Warger because he lost his leg, do you think that you are already tending to favor his side of the case and not—so you are, aren't you?

MS. ABDO: Yes.

MR. KAPPELMAN: This is probably not the right case for you, is it?

MS. ABDO: Maybe not.

MR. KAPPELMAN: Because you couldn't be fair to [121] my client, Randy Shauers, right?

MS. ABDO: Right.

MR. KAPPELMAN: I challenge the juror for cause, Your Honor.

THE COURT: Mr. Beardsley, would you like to inquire?

MR. BEARDSLEY: Yes. Everybody has sympathy for someone that lost their leg, right? The question becomes we have a liability issue first, okay? Then we have the damages issue. You can't take things out of your life common sense, care about people, care if they lost a leg. The question becomes can you look at the issue of liability by looking at the facts of the case, not whether you

have sympathy for someone that has been injured? Can you do that?

MS. ABDO: I would like to say yes that I could, but I know always underlying would be sympathy.

MR. BEARDSLEY: And you could do—you would do the best you can to follow the instructions of the Court? If the Court said you are not supposed to consider – as best you can; that's all we can do is the best you can—sympathy you would try to follow the Court's orders?

MS. ABDO: Well, of course.

MR. BEARDSLEY: And when it came to the injuries, do you think that you could consider the factors that the [122] Court lays out that you can consider and when the Court says this is not about sympathy, you would try as best you can to do that as well?

MS. ABDO: Yeah.

MR. BEARDSLEY: And you would work very hard to be a fair juror to both sides?

MS. ABDO: Yes.

MR. BEARDSLEY: Your Honor, I object to her being released for cause. I just think you can't – everybody has sympathy for people when they get injured and I think it's a natural thing and I think she's being very honest. I don't think it's a cause situation.

THE COURT: Let me ask you, Ms. Abdo: both attorneys have made the point that whenever we have a case with a serious injury or death involved, we are all

going to have a natural human reaction and that reaction is one of sympathy or empathy for the person or the family who suffered the loss. We deal with that issue in this courtroom every week in a criminal or civil case. But we do ask as jurors when we take the oath that understanding those human feelings, which are natural and which occur for all of us, really, are we able, when we take the oath to sit in this role now as a juror, are we able to fairly hear the evidence presented by both sides. Do you believe that you can fairly hear the evidence presented by both sides?

[123] MS. ABDO: Yes.

THE COURT: All right. As you sit there, have you reached any conclusion as to who is at fault for this collision?

MS. ABDO: I really do have an opinion on that, just knowing that it's Rally week and those of us from around here we know that there's going to be all these motorcycles and that just—that we should be a little extra careful because they are a motorcycle.

THE COURT: Let me make sure you understand it. As you sit there at this point in the jury selection, you believe you have formed an opinion as to who is at fault for this collision?

MS. ABDO: A little bit of an opinion just from whatever I heard.

THE COURT: Well, part of the challenge here is not a single word that either lawyer has said is evidence of anything. This is jury selection. After this, you are going to hear opening statements after we select a jury and not

a single word of what lawyers say in opening statements is evidence either. The only thing you can listen to as a juror which proves the case or not comes from this witness stand. So right now you have heard not a single word as evidence in the case. Knowing that, do you believe that you are in a frame of mind where you can put aside any [124] thoughts or feelings that you develop to this point and start your process of understanding this case and judging evidence when a witness testifies?

MS. ABDO: Yes, I think I can do that.

THE COURT: All right. Does it help you to have thought through that process as to really it's not until witnesses testify that you have any information or you can begin to form a position in the case. Are you willing to do that in this case?

MS. ABDO: Yes.

THE COURT: At this point do you believe that you could follow my instructions on the law in the case?

MS. ABDO: Yes.

THE COURT: Do you believe that you could wait until you hear all the evidence in the case before reaching any conclusion in your mind as to who is at fault for this matter?

MS. ABDO: Yes.

THE COURT: Are you willing to confer with your fellow jurors in deliberations and share their thoughts and opinions before reaching a conclusion?

MS. ABDO: Yes.

THE COURT: All right. Well, those are the elements of serving as a fair and impartial juror, and it's as much as we can ask of anyone. For that reason I am [125] going to deny the challenge for cause. I appreciate your candor very much.

Now we are going to take our noon recess. We are going to be in recess until 12:20—I'm sorry, 1:20 today. 1:20. It's 12:05 on this clock at this point.

Now, I must remind you, and you can see, ladies and gentlemen, who are having the uncomfortable experience of sitting in those benches, you may still be selected as a juror in this case.

Do not talk to one another about the attorneys, about anything you have heard, about the parties to the case. Do not go out to the scene that's been described to you. Do not go to Google Earth and google up the scene. Do not investigate. Do not consider anything about this case at this point or talk to anyone on the face of this planet about this case. I guarantee you if you are selected as a juror you will know more than anybody else about these matters in reaching your decision as a juror.

So in respect of your oath, I ask you to observe these things and to keep a completely open mind. You have not heard a single word that will bear on your decision as a juror in this case. This is just jury selection.

So with that admonition, we will regather here at 1:20 to finish jury selection as well as those of you who have not yet been selected. 1:20, please.

[126] Mr. Beardsley.

MR. BEARDSLEY: Can they go back to the same seats when they come back so that we don't have them in different seats?

THE COURT: Yes, they will be asked to do that. Jeana will make certain that everyone is in the same seat so we have a chart and the lawyers are making the necessary notes. So please resume the seat that you are occupying now when you come back into the courtroom. Court is in recess until 1:20.

(Noon recess.)

THE COURT: Thank you. Please be seated. Mr. Kappelman, you were conducting your voir dire examination. You may proceed.

MR. KAPPELMAN: Thank you, Your Honor.

Good afternoon, ladies and gentlemen. Mrs. Abdo, I need to visit with you again. I am not trying to pick on you; I want you to know that. Okay? It's really important for my client to make sure we understand exactly where you are coming from before we get going here. Okay.

I realize I asked you questions and Mr. Beardsley did and Your Honor asked you some questions. I thought you told me before that you really didn't feel very comfortable about sitting on this because of this sympathy problem and you just didn't think you could be fair to my client, Randy [127] Shauers, you know, given how you feel about what happened to your husband. And so this is just really kind of important for our side of this case to get out how you feel and whether you are really—this is really the right case for you or us. So I need to ask you again: before we get started here, are you all ready to

favor Mr. Warger's side of this case to the disadvantage of my client, Randy Shauers, because it's hard for you to get past your life experience? I understand that if that's the case that's the case; we just want to know.

MS. ABDO: I was earlier. I thought about it over my lunch hour. Now knowing that I am going to have to make a decision on who was responsible, I would like to make the right decision on that.

MR. KAPPELMAN: Okay. And so—

MS. ABDO: I could put my sympathy away just to make sure that the right thing is done.

MR. KAPPELMAN: Okay. So I am hearing you to say that you can—you would take the Court's instruction, because the Judge will tell you sympathy doesn't play any part in this—you are not to allow that to enter into your deliberations at all and you can accept that instruction?

MS. ABDO: Yes.

MR. KAPPELMAN: And decide this case based upon [128] who is at fault in the accident, did they show you to your satisfaction by the greater convincing force of the evidence, that Mr. Warger is correct here that Randy Shauers was somehow negligent in causing this accident? You would make them show you that?

MS. ABDO: Yes.

MR. KAPPELMAN: Before you would ever get to damages?

MS. ABDO: Oh, yes.

MR. KAPPELMAN: Thank you. Now, Ms. Whipple, I want to ask you about this idea of sympathy. Vitally important here because we all know Mr. Warger lost his leg. We know that everybody is sympathetic to Mr. Warger; that is a given. I need to make sure from every one of you that that is not going to decide this case because if that decided the case, well, then, we can just all go home. All right?

MS. WHIPPLE: Yes.

MR. KAPPELMAN: So how do you feel about that?

MS. WHIPPLE: I would not let that enter—you know, sway my decision any. I want to hear the facts and make a decision on the facts and not on sympathy.

MR. KAPPELMAN: You would be able to set that sympathy idea aside and just decide it upon what really happened?

[129] MS. WHIPPLE: Yes.

MR. KAPPELMAN: And that's going to come from the witnesses on the witness stand?

MS. WHIPPLE: Yes.

MR. KAPPELMAN: Thank you very much. Sir, how do you feel about this setting aside sympathy? Can you set aside sympathy in this case and decide it based upon what actually happened out there and in August 4, 2006?

MR. GUTHRIE: Yeah, I think I could decide it objectively about what happened. I don't think anybody messed up feeling what they feel. That's all there is.

MR. KAPPELMAN: Sure. And that's absolutely right. I nor Mr. Beardsley can affect how you feel, but we do know that sympathy is a normal human reaction. We do know that it's in this courtroom and it's going to be for Mr. Warger; but the key is whether you can set that aside and base your decision in this case not on sympathy, but on who caused the accident. Are you willing to do that? Can you do that?

MR. GUTHRIE: Yeah.

MR. KAPPELMAN: Sir, Mr. Guthrie—

MR. GUTHRIE: Yes.

MR. KAPPELMAN: I'm sorry. Wrong person. Mr. McCamly, how do you feel about that, sir?

[130] MR. MCCAMLY: I am willing to listen to the evidence first, then from that point what you hear and what you believe. As far as empathy, I mean, that shouldn't come into a factor until not even necessarily until—but until you hear the evidence and you make a determination as to what—how you feel about it.

MR. KAPPELMAN: Okay. If the Judge instructs you sympathy is not to play any part in your deliberations in this case, any part of how you decide this case, can you assure me or Randy Shauers that you will do that?

MR. MCCAMLY: Yes.

MR. KAPPELMAN: Thank you. Mr. Zandstra, how do you feel about being able to set aside sympathy and decide this case based upon what you hear from the wit-

ness stand and not the fact that you are sympathetic toward Mr. Gregory Warger?

MR. ZANDSTRA: It won't be a problem.

MR. KAPPELMAN: No problem for you?

MR. ZANDSTRA: No.

MR. KAPPELMAN: You'd make them prove their case first and meet their burden of proof?

MR. ZANDSTRA: Right.

MR. KAPPELMAN: Ms. Fines, can you assure me that you can set aside sympathy that you may feel for Mr. Gregory Warger and decide this case based upon what [131] happened on August 4, 2006; factually what happened, not on the fact that you feel sorry for Mr. Warger?

MS. FINES: Yes.

MR. KAPPELMAN: That's not going to be a problem for you?

MS. FINES: No.

MR. KAPPELMAN: Thank you. Ms. Merritt, your reaction to that. How do you feel about setting aside sympathy and deciding this based upon the facts of the case, witnesses who testified, and not saying, "I feel so sorry for the man I think I will skip over really what happened here."

MS. GILBY-MERRITT: Yes.

MR. KAPPELMAN: Can you do that?

MS. GILBY-MERRITT: Yes.

MR. KAPPELMAN: Thank you. Ms. Lemmel, how do you feel about that? Can you set aside sympathy and decide this case based upon what actually happened out there? Sympathy is not going to arrive at how you decide this case? You can assure me that?

MS. LEMMEL: Yes.

MR. KAPPELMAN: Thank you. That's just what I need; I need an assurance from you. Mr. Tripp, Jason Tripp, your reaction to that; can you set aside sympathy and decide this case based upon the facts?

[132] MR. TRIPP: Yes.

MR. KAPPELMAN: You are not going to feel so sorry for Mr. Warger because he lost his leg that you don't really care what happened out there?

MR. TRIPP: It's about what happened.

MR. KAPPELMAN: It's about what happened, isn't it? You will make them prove their case to you?

MR. TRIPP: Correct.

MR. KAPPELMAN: I appreciate that. Ms. Whitmyre, can you set aside sympathy?

MS. WHITMYRE: Sympathy won't be a problem.

MR. KAPPELMAN: You are going to make them prove their case?

MS. WHITMYRE: Yes.

MR. KAPPELMAN: Just like they have to before you ever talk about damages?

MS. WHITMYRE: Yes.

MR. KAPPELMAN: You are not going to be thinking that I feel so sorry for the man that I just have to find some way to—

MS. WHITMYRE: That's beside the point.

MR. KAPPELMAN: I appreciate that. It is beside the point and the Judge will tell you it's beside the point. That's the thing here, I want to make sure you can follow the Judge's instructions. Sympathy shall not play [133] any part in your deliberations. You can do that?

MS. WHITMYRE: Yes.

MR. KAPPELMAN: Okay. What about you, sir, Mr. Titus?

MR. TITUS: Yes.

MR. KAPPELMAN: Can you do that?

MR. TITUS: Yes.

MR. KAPPELMAN: And make them prove their case to you before you start talking about any kind of money?

MR. TITUS: Yes.

MR. KAPPELMAN: And you are not going to decide this case because you feel so sorry that the man lost his leg?

MR. TITUS: Correct.

MR. KAPPELMAN: Fair? Can you do that?

MR. TITUS: (Nodding.)

MR. KAPPELMAN: Okay. Mr. Besso, sound reasonable to you, sir, that we should be able to set aside sympathy?

MR. BESSO: Yes.

MR. KAPPELMAN: And can you do that?

MR. BESSO: Yes.

MR. KAPPELMAN: You feel sorry for him probably because he lost his leg, right? Right?

MR. BESSO: A little, but—.

[134] MR. KAPPELMAN: A little? Well, it's natural that you would. I understand that, I mean, but I am just making sure you can follow the Judge's instructions; that's what I want. You can do that?

MR. BESSO: Yes.

MR. KAPPELMAN: Okay. You are going to make them prove to you that Mr. Shauers actually did something wrong before you are going to give any money?

MR. BESSO: Correct.

MR. KAPPELMAN: Okay. I'm sorry I have to keep looking at this list. Ms. Smith, can you set aside sympathy and decide this case based on the facts?

MS. SMITH: I can.

MR. KAPPELMAN: You are not going to jump to conclusions because you feel sorry for Mr. Warger?

MS. SMITH: No.

MR. KAPPELMAN: You will make them prove to you by a greater convincing force of the evidence that Randy Shauers actually did something to cause this accident; was actually negligent that day before you are going to talk about money?

MS. SMITH: Right. Listen to the facts.

MR. KAPPELMAN: Listen to the facts. Okay. Thank you very much. That's what we are asking is that you listen to the facts. [135] Ms. Simpson, can you set aside sympathy?

MS. SIMPSON: Yes, I can.

MR. KAPPELMAN: And follow the Judge's instructions and that's not to decide this case—that's not to have anything to do with how you decide this case.

MS. SIMPSON: The facts and the law.

MR. KAPPELMAN: Facts and the law. Good point. That's what you are interested in?

MS. SIMPSON: Yes.

MR. KAPPELMAN: Thank you very much. Ms. Scheler, can you set aside sympathy?

MS. SCHELER: Yes, I can.

MR. KAPPELMAN: And decide this based on the facts and law, as Ms. Simpson just said?

MS. SCHELER: Yes, I will.

MR. KAPPELMAN: You can assure Randy Shauers of that?

MS. SCHELER: Yes, I can.

MR. KAPPELMAN: Mr. Knapp, can you set aside sympathy and decide this upon the facts and the law as Ms. Simpson has so succinctly and appropriately said?

MR. KNAPP: I think so.

MR. KAPPELMAN: You are not going to jump to conclusions here because you feel sorry for Mr. Warger, who lost his leg?

[136] MR. KNAPP: No.

MR. KAPPELMAN: You are going to make them prove their case before you start talking about money?

MR. KNAPP: Yes.

MR. KAPPELMAN: Okay. Mr. Rubins, is that going to be a problem for you?

MR. RUBINS: No, sir.

MR. KAPPELMAN: You can set aside sympathy?

MR. RUBINS: Yes, I can.

MR. KAPPELMAN: And decide this based upon what really happened out there?

MR. RUBINS: Yes.

MR. KAPPELMAN: If you find that Mr. Warger pulled out on that highway, failed to yield to Randy Shauers, he did everything he could to avoid the accident, but it still happened, you are not going to let sympathy override the facts, is that right?

MR. RUBINS: That's correct.

MR. KAPPELMAN: Mr. Murphy, your reaction to this sympathy proposition.

MR. MURPHY: I will base my decision on the facts presented by both parties.

MR. KAPPELMAN: You are going to make them prove their case before you are going to start talking about money, right?

[137] MR. MURPHY: Exactly.

MR. KAPPELMAN: You'll base it upon what the witnesses are saying, all of the witnesses?

MR. MURPHY: Yes.

MR. KAPPELMAN: And what the law is?

MR. MURPHY: Right.

MR. KAPPELMAN: Do you all realize that in our country you can be sued for anything and you have to come and defend yourself no matter what it was? In other words, even if there's just a simple accident, that's what it was, and you get sued you have to come in and defend yourself. Do you all understand that's how the system works? Does anybody think that just because we are here and just because Randy Shauers got sued that somehow there must be something to this that he must have done something wrong just because we are here spending so much time talking about it? Does anybody feel that way before we even get started? Do you have any reaction to that, sir? You have no answer?

MR. TITUS: No answer.

MR. KAPPELMAN: You understand that—you have been in lawsuits—you understand you can be sued for anything, right? You got to go to court and defend yourself, right?

MR. TITUS: Right.

[138] MR. KAPPELMAN: How do you feel about that, Mr. Murphy, that anybody in our country can sue anybody for anything and then the person who gets sued, like Randy Shauers, has to come in here and defend himself? That's the way the system works, isn't it?

MR. MURPHY: That's the way it works. It's been said time and again it's not a perfect system, but you find a better one I will vote for it.

MR. KAPPELMAN: Good point. It is a good system. I agree it might not be perfect, but it does work. But you don't find any merit to the fact that we are here arguing

about who may have caused this accident, if there might be something to this, just because Mr. Warger started a lawsuit against Randy Shauers?

MR. MURPHY: I have already said I will base it on the facts. We will find out what is worthy and what isn't worthy and we will determine it on that basis.

MR. KAPPELMAN: Anybody here think that just because Mr. Warger has incurred a large amount of medical bills—and he has—that he must be entitled to something by way of damages in this case? Does anybody think that before we even get started? He has got a lot of medical bills; he's going to have future medical bills. Does anybody think just because that's the case, that somehow he should win this lawsuit? Anybody think that [139] before we even get started, before witness one talks? I am assuming that everybody drives a car. I suppose I should ask for a show of hands for anybody that doesn't drive a car. Some of you have indicated that you have driven trucks and pulled trailers. I want to see what kind of experience you had—and I couldn't write it down quite fast enough. Let's go with the back row first. Anybody in the back row that has driven a truck and pulled a trailer of any kind? Mr. Zandstra, what's your experience in that regard?

MR. ZANDSTRA: Pulling a boat behind a truck.

MR. KAPPELMAN: You have done that for a number of years?

MR. ZANDSTRA: Yeah.

MR. KAPPELMAN: You pull it up to Pactola or Sheridan Lake?

MR. ZANDSTRA: Sheridan.

MR. KAPPELMAN: What size of boat are you talking about?

MR. ZANDSTRA: Small one.

MR. KAPPELMAN: Ever had any accident doing that?

MR. ZANDSTRA: No.

MR. KAPPELMAN: Any near misses doing that?

MR. ZANDSTRA: No.

MR. KAPPELMAN: Good. What about show of [140] hands—yes, ma'am.

MS. WHIPPLE: When we lived on the ranch I used to pull a stock trailer around once in a while. Never any incidents.

MR. KAPPELMAN: Ever pulled it on the highway?

MS. WHIPPLE: Oh, yeah.

MR. KAPPELMAN: How big of a stock trailer?

MS. WHIPPLE: A 16 foot; then we had a 20 foot.

MR. KAPPELMAN: Where was your ranch?

MS. WHIPPLE: In Todd County, down south of here.

MR. KAPPELMAN: Now, when you would pull that, what kind of weight are we talking about when it was fully loaded?

MS. WHIPPLE: Sometimes we had cattle in it; sometimes I went to town and got cake; when we got bagged cake, we'd load it in there.

MR. KAPPELMAN: So sometimes you had a few thousand pounds?

MS. WHIPPLE: Yeah, 4,000 pounds, whatever.

MR. KAPPELMAN: All right. You did this by yourself?

MS. WHIPPLE: Yes.

MR. KAPPELMAN: Never had any problems?

MS. WHIPPLE: Just backing it up.

MR. KAPPELMAN: Backing it up. I know what you [141] mean; that's a problem. How about the second row; show of hands of people that have driven a pickup, pulled a trailer of any kind. Ms. Whitmyre.

MS. WHITMYRE: Pulled my horse trailer; then I had a little flatbed trailer that I pulled.

MR. KAPPELMAN: Your horse trailer fully loaded would be how much weight, do you think?

MS. WHITMYRE: I am not very good about that. It's probably 16 foot and I'd have horses in it.

MR. KAPPELMAN: How many horses?

MS. WHITMYRE: Two to four.

MR. KAPPELMAN: That's a fairly significant weight you are pulling. Any problems doing that?

MS. WHITMYRE: No.

MR. KAPPELMAN: Any near misses?

MS. WHITMYRE: No. I am lucky.

MR. KAPPELMAN: Ever driving along and had anybody pull out in front of you and try to miss them?

MS. WHITMYRE: Oh, I have had that happen, but I'd have to stop; I didn't have a problem. I'd growl a little.

MR. KAPPELMAN: The tires screamed? Oh, you growled a little. Okay. I understand. Ms. Lemmel, you said was it a stock trailer you pulled as well?

MS. LEMMEL: To Colorado and back; had cows and [142] horses. I am willing to pull it.

MR. KAPPELMAN: Still to this day?

MS. LEMMEL: Uh-huh.

MR. KAPPELMAN: But the type of trailer you are talking about is with animals and stuff, horses, right?

MS. LEMMEL: Yeah. Then the one I come from Colorado I had Longhorns and stuff, yeah. I have done a lot of it.

MR. KAPPELMAN: Never had any accidents?

MS. LEMMEL: In Fort Collins.

MR. KAPPELMAN: Excuse me?

MS. LEMMEL: In Fort Collins for a sale.

MR. KAPPELMAN: Any accidents?

MS. LEMMEL: Yeah, one. Well, I had a cow in the back; he got to whiplashing on me and pretty soon I was going back and forth and pretty soon I put the brakes on. I went, like, whiplash, or whatever you want to call it, but I didn't flip over.

MR. KAPPELMAN: It was scary?

MS. LEMMEL: A miracle.

MR. KAPPELMAN: Okay. That sounds like it didn't involve another motorcycle.

MS. LEMMEL: I drove across the road down there and other people went by and I got back out of there and proceeded to the sale barn.

[143] MR. KAPPELMAN: Everything worked out for you?

MS. LEMMEL: Yeah.

MR. KAPPELMAN: Anybody else here? Yes, sir. You said you pulled a trailer. What type of trailer was that?

MR. TITUS: I pulled a fifth wheel camper trailer; also pulled an ATV sport trailer; car trailer I pulled.

MR. KAPPELMAN: Okay. Where do you pull your fifth wheel?

MR. TITUS: Mainly around the Black Hills to camp.

MR. KAPPELMAN: But you've had it out on the highway. Have you had it in the hills during Rally time?

MR. TITUS: No.

MR. KAPPELMAN: Anybody else here in this row? First row? Yes.

MR. RUBINS: Just military cargo.

MR. KAPPELMAN: Big trailers?

MR. RUBINS: No, not compared to that. Just standard box car type trailer; goes on the back of a duce and a half or 5 ton; nothing significant like that; or a water buffalo.

MR. KAPPELMAN: Ever had any accidents doing that?

[144] MR. RUBINS: No, sir.

MR. KAPPELMAN: Good for you. But you have had some experience doing that?

MR. RUBINS: Yes.

MR. KAPPELMAN: I talked to the people here who have operated motorcycles. Mr. Murphy, first of all, I think you operated motorcycles. How many years have you ridden a motorcycle?

MR. MURPHY: Haven't ridden one for about 35 years.

MR. KAPPELMAN: Before 35 years ago, what was your experience riding motorcycle?

MR. MURPHY: Two accidents. One required knee surgery and the other one just got scuffed up a little bit.

MR. KAPPELMAN: If you don't mind me asking, can you kind of give me—fill me in on the details of these accidents?

MR. MURPHY: The first accident riding my bike it was my fault. I pulled out in front of the alleyway, and thought I had second gear and I didn't, so I had first gear; my front end came off the ground and I hit a Cadillac head on; took his windshield out with my knee; that's what caused the injury. 17 weeks later I was back to work.

MR. KAPPELMAN: Where was that at, sir?

MR. MURPHY: Aberdeen.

[145] MR. KAPPELMAN: Oh, I see. You are from Aberdeen?

MR. MURPHY: Yes.

MR. KAPPELMAN: You were much younger back then, obviously. Now, the second accident—was that the first accident?

MR. MURPHY: That was the first accident. Second accident wasn't quite as bad. In fact, I repaired that one myself. But I went from gravel on to pavement. If you

have ever ridden on a bike where there's some gravel on the pavement, sometimes it's like being on ice; and I slid off the side of the road and hit a free-standing post; kind of bent up my front end a little bit. Me, I just got scuffed up a little bit.

MR. KAPPELMAN: Okay. And then you gave up riding?

MR. MURPHY: I rode a few more years and I figured, well, I thought two strikes; I always thought about getting a bike again; probably won't happen.

MR. KAPPELMAN: And what type of bike are we talking about?

MR. MURPHY: Small; 250 Harley Davidson. It was an off-road bike, primarily.

MR. KAPPELMAN: Do you feel like any of your experiences in riding motorcycle is going to in any way [146] affect how you view this case? Let me ask a different question. I am more obviously concerned that maybe you might be more predisposed to favor a motorcycle rider over a person who is driving a pickup pulling a trailer. Should I be concerned at all about that?

MR. MURPHY: Well, both my accidents were my fault so I wouldn't know why I would feel that way. Wouldn't be a problem, given the circumstances.

MR. KAPPELMAN: You are willing to look at the facts?

MR. MURPHY: Yes.

MR. KAPPELMAN: You, sir, have you ridden motorcycle?

MR. RUBINS: No.

MR. KAPPELMAN: I know Mr. Knapp has and I know we have been through that extensively. I don't remember Mr. Beardsley asking this question, though, Mr. Knapp. Do you think that given your motorcycle experience and the years you have ridden, that somehow you would tend to favor a motorcyclist over a person driving a pickup?

MR. KNAPP: No, I don't think so.

MR. KAPPELMAN: Do you still ride?

MR. KNAPP: Yes.

MR. KAPPELMAN: What type bike do you own?

MR. KNAPP: A road bike.

[147] MR. KAPPELMAN: Like a Harley Davidson?

MR. KNAPP: It's not a Harley. I have quite a few.

MR. KAPPELMAN: You have quite a few motorcycles? How many?

MR. KNAPP: 13.

MR. KAPPELMAN: 13 motorcycles. Accidents; have you had your share of accidents or no?

MR. KNAPP: I have had a couple.

MR. KAPPELMAN: Have they been somebody else's fault or your fault?

MR. KNAPP: One was mine; the other one I don't think was mine.

MR. KAPPELMAN: I think we talked about this. I must confess that I can't remember it, so can you tell me about both of them?

MR. KNAPP: Well, the one that was mine I was out on the race track racing.

MR. KAPPELMAN: Right.

MR. KNAPP: The other one I had down in Pierre and I don't know where the car come from. I hit his back wheel. I was on the street and he claimed he was on the street going the same direction as I was and I ended up on the pavement.

MR. KAPPELMAN: Okay.

[148] MR. KNAPP: Hard to hit the back wheel on the car when you are both going the same direction.

MR. KAPPELMAN: Okay. Why do you say that?

MR. KNAPP: Well, the back wheel on the car is under the fender.

MR. KAPPELMAN: So it would be a little hard to hit it. Did you ever figure out how that happened?

MR. KNAPP: Well, in my mind he was turning in front of me, but it was never proven.

MR. KAPPELMAN: Did you have a lawsuit over that?

MR. KNAPP: No.

MR. KAPPELMAN: Did you get hurt?

MR. KNAPP: I got some road rash.

MR. KAPPELMAN: Nothing serious enough to have a lawsuit about, apparently?

MR. KNAPP: No.

MR. KAPPELMAN: Now let's talk about—in the second row—motorcycle riders. Who in the second row has ridden a motorcycle? That would be you, Mr. Titus. What's your experience on riding motorcycle?

MR. TITUS: I started riding when I was six or seven; and I sold the Harley with my camper trailer.

MR. KAPPELMAN: When was that?

MR. TITUS: Up until about eight years ago.

MR. KAPPELMAN: So you sold the Harley, like [149] early 2000, 2002, thereabouts, right?

MR. TITUS: Yeah.

MR. KAPPELMAN: Before that were you doing a lot of riding?

MR. TITUS: I pretty much was in a motorcycle; I have some dirt bikes; road bikes; last bike I had was a Harley.

MR. KAPPELMAN: Have any accidents with that Harley?

MR. TITUS: No accidents.

MR. KAPPELMAN: Good for you. Anybody else here in the second row ride motorcycles? And I think—did you say, Mr. Guthrie, that you ride motorcycle? No?

MR. GUTHRIE: I have, but not recently.

MR. KAPPELMAN: You have in the past?

MR. GUTHRIE: Yeah. Just off-road.

MR. KAPPELMAN: Off-road. How long ago since you rode one?

MR. GUTHRIE: Couple five years; I don't know.

MR. KAPPELMAN: These were mainly dirt bikes?

MR. GUTHRIE: (Nodding.)

MR. KAPPELMAN: Do you own one right now?

MR. GUTHRIE: (Shaking head.)

MR. KAPPELMAN: Ever have any accidents with your motorcycle?

[150] MR. GUTHRIE: No.

MR. KAPPELMAN: Anyone else in the back row that is a motorcycle rider? Now we are in the past. Anyone here ever been involved in any kind of a motorcycle/motor vehicle accident of any kind that involved a

failure to yield where one vehicle failed to yield to another? That could have probably happened to you it almost sounds like, Mr. Knapp, but you don't know for sure. I understand. Any anybody else involved in any kind of an accident where the cause of the accident was that the person failed to yield either you to someone else or someone else failed to yield to you? Yes, Mr. Zandstra.

MR. ZANDSTRA: I had a car come at me and I hit him 20 years ago.

MR. KAPPELMAN: Turned in front of you? You are on a main-traveled road and a car pulls out from the side road?

MR. ZANDSTRA: Correct.

MR. KAPPELMAN: Did the car pull out from your right or left or can you remember?

MR. ZANDSTRA: I think it was my right.

MR. KAPPELMAN: Right into your path?

MR. ZANDSTRA: Right.

MR. KAPPELMAN: You couldn't miss him?

MR. ZANDSTRA: He was coming the opposite [151] direction and—

MR. KAPPELMAN: And turned in front of you?

MR. ZANDSTRA: Right.

MR. KAPPELMAN: You didn't have time to miss him?

MR. ZANDSTRA: No.

MR. KAPPELMAN: So the accident happened. Did you get hurt?

MR. ZANDSTRA: No.

MR. KAPPELMAN: Anyone else here involved in any—yes, Mr. Tripp.

MR. TRIPP: I was going out of the parking lot and a gentleman from the intersection turned in the same parking lot. I pulled out; he hit my back end; that was that.

MR. KAPPELMAN: Okay. So he failed to yield to you?

MR. TRIPP: I pulled out, so it actually ended up being my fault because he had his blinker on so that doesn't give him failure to use that turn, so it was still my fault.

MR. KAPPELMAN: You failed to yield?

MR. TRIPP: Yes, I failed to yield.

MR. KAPPELMAN: All right. Anybody else? Anyone here believe that if you have an accident with someone as you are coming up behind them you are [152] automatically at fault for the motor vehicle accident no matter what happened? Anybody believe that if you are coming up behind somebody and you have an accident with the person in front of you, that somehow you are at fault no matter what happened? Does anybody think that?

In a situation where you have one vehicle going one direction and the other vehicle going the same direction, would it matter to you as far as what may have caused the accident as far as whether somebody pulled out in front of you and failed to yield in front of you, then you ran into the back end of them? Would that matter to you, sir? You are shaking your head. Does that make sense?

MR. MURPHY: Yes, it's common sense.

MR. KAPPELMAN: Sure. Someone pulls out in front of you, doesn't yield to you, and you are coming down the highway and you have an accident; you are in the rear, you are in the trailing vehicle, but you are not at fault; the guy doesn't yield to you. Would you agree?

MR. MURPHY: Correct.

MR. KAPPELMAN: Does that sound right to the rest of you? Anybody disagree with that? Would you all agree with me that you need to know all the facts about what happened in an accident, not just the fact that one vehicle may have been a trailing vehicle [153] and another vehicle was in front, you'd need to have all the facts of what happened before you could decide who actually caused that accident; does that sound reasonable? Does that sound reasonable to you? Sir, Mr. McCamly, does that sound reasonable to you? You are a driver. You drive for a living, right?

MR. MCCAMLY: You got to have facts. I mean, for me, my job is on the line and you don't want to be wrongly accused of something. You want to—if you are at fault, you are at fault, but let it be proven. If you are not at fault, you are not at fault.

MR. KAPPELMAN: And it's important to have all the facts, isn't it, not just the fact that one vehicle may have been a trailing vehicle and another vehicle was in front of them; you have an accident you need all the facts.

MR. MCCAMLY: All factors that came into it.

MR. KAPPELMAN: Right. Somebody has failed to yield, pulled on to a highway in front of somebody and failed to yield; that's an important fact, isn't it?

MR. MCCAMLY: Very.

MR. KAPPELMAN: You'd need to know that. Now, we know this accident happened at the Rally time. We know that the hills are full of motorcycles during the Rally. What I'd like to know is: have any of you ever been driving along other than you, Mr. Zandstra, because you've [154] already answered the question, someone pulls out in front of you and you have to take action to avoid that vehicle that's just pulled out in front of you, be it a motorcycle, be it a motor vehicle. Has anybody had an experience like that if somebody that's pulled out in front of them and you have to take immediate action to try to miss them. Anybody had an experience like that? Mr. Knapp, sounds like you have been through that, haven't you?

MR. KNAPP: Yeah.

MR. KAPPELMAN: At least you think that's what happened?

MR. KNAPP: Also a snow plow.

MR. KAPPELMAN: Oh, that's right. Okay. So have you had people pull out in front of you in that snow plow and you have got to try to miss them?

MR. KNAPP: Yeah.

MR. KAPPELMAN: Ever had that happen with a motorcycle?

MR. KNAPP: Yes.

MR. KAPPELMAN: Yes? You have to try to miss the motorcycle?

MR. KNAPP: Well, you are not plowing.

MR. KAPPELMAN: Oh, okay. Makes sense. You are not plowing, but you are driving the truck for the county and a motorcycle pulls out in front of you, right? Is that [155] what you are saying?

MR. KNAPP: It happens.

MR. KAPPELMAN: It happens. And you try to avoid that motorcycle, don't you? We all know that during the Sturgis Rally we have got hundreds of thousands of motorcycles in the Black Hills; everybody knows that. Many of them get confused about where they are going because they are not familiar with the Black Hills. Have any of you ever had any situations that have happened to you where you can give me an example of you have seen a motorcycle rider engage in some sort of unsafe turning or stopping activity either during the time of the Rally, because there are so many here, or any other time? Anybody ever had an experience like that? You are shaking your head, sir. Mr. Titus.

MR. TITUS: Yeah, I have had them shift lanes. You are going in the inside lane, they signal to the right and change their mind and shift to the left. Not really close, but during the Rally, people get confused.

MR. KAPPELMAN: It's not unusual at all during the Rally people get confused. We have got hundreds of thousands of people out here that aren't from our area, right? It's no wonder, right? We all know it's no secret that nine or ten people got killed at the Rally this year, let alone the number that got hurt and ended up in the [156] emergency room that we didn't read about. So it happens. Would you all agree that that happens during Rally time? By virtue of the numbers you bring a few hundred thousand bikes into this area, it's going to happen, right? Agreed, Ms. Abdo?

MS. ABDO: Yes.

MR. KAPPELMAN: Have you had any close calls with any motorcycles? We got so many out here and some of them are confused about where they are going; have you had any experiences like that?

MS. ABDO: No. Just having to go slower on the Interstate is all.

MR. KAPPELMAN: Okay. Because there's so many coming back and forth?

MS. ABDO: Yes.

MR. KAPPELMAN: And you know in the hills there's even more?

MS. ABDO: Uh-huh.

MR. KAPPELMAN: All right. Anybody else other than Mr. Titus that's had any experience with close calls with motorcycles pulling out in front of you forcing you to get on the brakes or anything like that? Nothing? Okay. Some of you have been prior jurors. Mr. Murphy, you talked about that case up in Spearfish; that's only been like a year and a half ago.

[157] MR. MURPHY: Seems like it was in the spring time, before summer last year; give or take it was a year.

MR. KAPPELMAN: Was that a slip and fall? Someone slipped and hurt themselves at Safeway?

MR. MURPHY: No. A truck that was unloading at the dock moved and it had a metal plate that was between the dock and the semi, and a woman at work there fell and the plate came down, too, so she got a back injury and she got hurt pretty good.

MR. KAPPELMAN: Was there—in that particular case were you trying to determine whether there was liability on behalf of the store? In other words, were there two issues or was it just damages?

MR. MURPHY: No. It was liability had everything to do with it because there was some safety issues that were not addressed by the trucking company and there was also some issue with the employee whether what she did was correct. We had to determine that and damages.

MR. KAPPELMAN: Okay. Some of you were involved in criminal trials; a lot of you. Of course, that's—anybody else here on a civil jury like we are having here, a civil case as opposed to a criminal case? I think Mr. Besso you said yours was criminal?

MR. BESSO: Yes. I had them confused.

MR. KAPPELMAN: That's okay. You are not a [158] lawyer; it's easy to confuse them. No problem there. I understood what you were saying. I am looking for anybody else that has been a juror on a civil case like this is where I am not talking about a criminal violation, we are talking about civil case. Anybody? Let me ask you this question: anybody ever been an eyewitness to an accident and someone else was an eyewitness to the accident and you both remember it differently? Anybody have an experience like that? Ms. Smith, ever been an eyewitness to an accident?

MS. SMITH: No.

MR. KAPPELMAN: Nobody has been an eyewitness to an accident? Okay. Does anyone here think that a person who is an eyewitness to an accident that their memory of that accident would get better over time; in other words, the longer you get past the event the better your memory gets? Anybody believe that? What about you, Ms. Fines, do you think that a person's memory of an accident actually gets better years later than it was right at the time of the accident?

MR. BEARDSLEY: Your Honor, I am going to object; misstatement of the record and it's argument of the case prior to ever getting into the case, not what the evidence would show.

THE COURT: Ladies and gentlemen, and those of [159] you who may be called as jurors in the case, when the lawyers are asking questions and asserting facts or scenarios in their questions and asking for your response, they are doing that in order to test your experi-

ence and background in life. It's absolutely nothing to do with any evidence in the case. This is not evidence of any kind, so don't assume you will or won't hear a scenario that a lawyer is describing. There's a reason the questions are framed the way they are being framed. So just do your best to understand the question and if you have a response, please answer. Otherwise, counsel will move on.

You may ask your question, Mr. Kappelman.

MR. KAPPELMAN: Thank you, Your Honor.

So apparently nobody thinks that a person's memory of an accident gets better over time. Would you all agree with that? Generally memory fades over time; doesn't get better. That sound reasonable?

MS. WHITMYRE: Mine does.

MR. KAPPELMAN: I am just asking if anybody had an experience where they think their memory actually gets better years after an event. I take it everyone actually thinks that probably memories fade, fair? Now, it sounds like we only have one person with military experience, at least that I have heard so far, and that's Mr. Rubins. Does anybody else have any kind of [160] military experience? You will hear that Mr. Warger has some military experience. He was in the Navy, Naval Reserves. Is that going to matter to you, sir? You are a military man.

MR. RUBINS: No, sir. All I need to hear is the facts and base my decision off that. Obviously, I respect anybody else that's in the military.

MR. KAPPELMAN: We all do. We all respect the military and thank you that you were in the military. I am just asking that we are not starting off behind the eightball with you because Mr. Warger has been in the military, so have you—you are telling me that that's not going to decide this case for you?

MR. RUBINS: No.

MR. KAPPELMAN: Okay. Has anyone besides Mr. Titus had engineering training; any training in the engineering field? Yes, sir, Mr. Guthrie.

MR. GUTHRIE: Little bit.

MR. KAPPELMAN: What would be the very little bit?

MR. GUTHRIE: I got about three years in at the School of Mines in chemical engineering, and I have done some surveying, and that kind of thing, in the summers; worked with explosives, contractors a little bit.

MR. KAPPELMAN: Are you still at Mines?

[161] MR. GUTHRIE: No.

MR. KAPPELMAN: How long has it been since you have been in school?

MR. GUTHRIE: About 10 years.

MR. KAPPELMAN: You got kind of close to your degree, or—?

MR. GUTHRIE: Kind of.

MR. KAPPELMAN: I appreciate that. Thank you. And the engineering was in what type of field?

MR. GUTHRIE: Chemical engineering.

MR. KAPPELMAN: I think yours is in civil?

MR. TITUS: Civil.

MR. KAPPELMAN: Anyone else with any engineering training or schooling? Mr. Zandstra.

MR. ZANDSTRA: It was in civil engineering when I first started college; then I switched majors.

MR. KAPPELMAN: Where was that at?

MR. ZANDSTRA: South Dakota State.

MR. KAPPELMAN: You have a couple of years of engineering studies?

MR. ZANDSTRA: Right.

MR. KAPPELMAN: Then you went into accounting?

MR. ZANDSTRA: Right.

MR. KAPPELMAN: Anybody else? Yes.

MS. SIMPSON: You want schooling in general? I [162] have been through a college accounting degree.

MR. KAPPELMAN: Any engineering type courses in any of that?

MS. SIMPSON: No. Took general and work related to accounting.

MR. KAPPELMAN: Where did you go to school?

MS. SIMPSON: Black Hills State.

MR. KAPPELMAN: Thank you. Anyone here have any medical training? Nurses, doctors, anybody have any kind of medical training at all? I anticipate that the Court will instruct you that you can use your common sense, your common knowledge in deciding this case. We don't ask you to check all your feelings at the door and all the things you know at the door here; you can use your common knowledge and common sense. Can you all assure me you will use your common sense in deciding the issues in this case?

Lastly, will you all agree with me that you will follow the law that Judge Viken gives you? You will listen to the witnesses; you will, if picked as a juror, decide the facts, and then he's going to give you the law. Then you are going to apply the law to those facts. I want to make sure—and Judge Viken went through this and I want to ask it again—if everyone can assure me that you will follow the law in this case as it's given to you by Judge Viken?

[163] Thank you very much. I pass the jury for cause, Your Honor.

THE COURT: Thank you, Mr. Kappelman.

Jeana, would you assist the attorneys in exercising their preemptory challenges, please?

Ladies and gentlemen, you are just going to relax and be patient. The lawyers are obligated on each side to strike three jurors because we have to reduce your size to 12 jurors who will be hearing the case.

(Off the record).

THE COURT: Jeana, if you would please read the names. Ladies and gentlemen, if your name is called, please stand.

DEPUTY CLERK OF COURT: Regina Whipple, Billy McCamly, Annette Merritt, Debra Simpson, Sheila Smith, Mike Besso, Stacey Titus, Jason Tripp, Joan Lemmel, David Rubins, Grant Guthrie, Anne Fines.

THE COURT: Mr. Beardsley, according to your notes, is this the jury which has been selected to hear the case?

MR. BEARDSLEY: Yes, Your Honor.

THE COURT: Mr. Kappelman, same question.

MR. KAPPELMAN: Yes, Your Honor.

THE COURT: Those of you whose names have not be called, if you can please go into the bench area of the [164] courtroom. Please don't leave until I excuse you. Those of you whose names have been called, you may find a comfortable place to sit or remain where you are, as you choose.

Jeana, would you please administer the oath to our jurors?

(Oath given to panel.)

[165] COURT REPORTER'S CERTIFICATE

STATE OF SOUTH DAKOTA)

SS

COUNTY OF PENNINGTON)

I, Judith M. Thompson, R.P.R., Official Court Reporter in and for the United States District Court, District of South Dakota,

DO HEREBY CERTIFY that I acted as such Court Reporter at the Jury Trial of the within-entitled action, and that the foregoing transcript, pages 1 to 164, inclusive, is a true and complete transcript of my shorthand notes taken at said Jury Trial.

Dated at Rapid City, South Dakota, this 11th day of July, 2012.

/s/_____

Judith M. Thompson, R.P.R.
Official Court Reporter

PETITIONER'S BRIEF

No. 13-517

In the Supreme Court of the United States

GREGORY P. WARGER, PETITIONER

v.

RANDY D. SHAUERS

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE PETITIONER

STEVEN C. BEARDSLEY
GARY D. JENSEN
BEARDSLEY, JENSEN
& VON WALD, P.L.L.C.
4200 Beach Drive, Suite 3
P.O. Box 9579
Rapid City, SD 57709

KANNON K. SHANMUGAM
Counsel of Record
JAMES M. MCDONALD
ELI SAVIT
LESLIE COOPER MAHAFFEY
WILLIAMS & CONNOLLY LLP
725 Twelfth Street, N.W.
Washington, DC 20005
(202) 434-5000
kshanmugam@wc.com

QUESTION PRESENTED

Whether Federal Rule of Evidence 606(b) permits a party moving for a new trial based on juror dishonesty during voir dire to introduce juror testimony about statements made during deliberations that tend to show the alleged dishonesty.

TABLE OF CONTENTS

Page

Opinions below 1

Jurisdiction 1

Rule involved 2

Statement 2

Summary of argument 12

Argument 16

I. Juror testimony about statements made during deliberations that tend to show dishonesty during voir dire is admissible under Federal Rule of Evidence 606(b)(1) 16

A. An inquiry into juror dishonesty during voir dire does not constitute an 'inquiry into the validity of a verdict' for purposes of Rule 606(b)(1) 16

B. The common-law predecessor to Rule 606(b) did not exclude juror testimony about dishonesty during voir dire 23

1. The common-law rule narrowly focused on impeachment of the verdict 23

2. Courts applying the common-law rule admitted juror testimony about dishonesty during voir dire 25

C. The drafting history and subsequent interpretation of Rule 606(b) support the conclusion that juror testimony about dishonesty during voir dire is admissible 30

1. The drafters of Rule 606(b) did not intend to prohibit juror testimony about dishonesty during voir dire 30

2. This Court's decision in *Tanner* further confirms that Rule 606(b) does not exclude juror testimony about dishonesty during voir dire 35

Page

Table of contents—continued:

D. The canon of constitutional avoidance requires interpreting Rule 606(b) to permit juror testimony about dishonesty during voir dire 37

E. Permitting juror testimony to prove dishonesty during voir dire would not contravene any of the policy considerations behind Rule 606(b) 40

II. In the alternative, juror testimony about statements made during deliberations that tend to show dishonesty during voir dire is admissible under Federal Rule of Evidence 606(b)(2)(A) 45

Conclusion 48

TABLE OF AUTHORITIES

Cases:

Clark v. *Martinez*, 543 U.S. 371 (2005) 39

Clark v. *United States*, 289 U.S. 1 (1933) ..... *passim*

Coughlin v. *Tailhook Association*, 112 F.3d 1052 (9th Cir. 1997) 44

Department of Public Works & Buildings v. *Christensen*, 184 N.E.2d 884 (Ill. 1962) 29

Georgia v. *McCollum*, 505 U.S. 42 (1992) 39

Ham v. *South Carolina*, 409 U.S. 524 (1973) 38

Hard v. *Burlington Northern R.R.*, 812 F.2d 482 (9th Cir. 1987) 42

Hyde v. *United States*, 225 U.S. 347 (1912) 25, 29, 34

Hyman v. *Eames*, 641 F. 676 (C.C.D. Colo. 1890) 27

Lowenfield v. *Phelps*, 484 U.S. 231 (1988) 20

Mathisen v. *Norton*, 60 P.2d 1 (Wash. 1936) 29

McDonald v. *Pless*, 238 U.S. 264 (1915) 24, 25, 42

McDonough Power Equipment, Inc. v. *Greenwood*, 464 U.S. 548 (1984) ..... *passim*

Missouri Pacific R.R. v. *Boone*, 270 U.S. 466 (1926) 37

Rosales-Lopez v. *United States*, 451 U.S. 182 (1981) .. 19, 38

Sheppard v. *Maxwell*, 384 U.S. 333 (1966) 16

Page

Cases—continued:

Shillcutt v. *Gagnon*, 827 F.2d 1155 (7th Cir. 1987) 39
Shipley v. *Permanente Hospitals*,
274 P.2d 53 (Cal. Ct. App. 1954).....29
State by Lord v. *Hayden Miller Co.*,
116 N.W.2d 535 (Minn. 1962).....29
Tanner v. *United States*, 483 U.S. 107 (1987) .....*passim*
Thiel v. *Southern Pacific Co.*,
328 U.S. 217 (1946).....16, 19, 21, 22
Tome v. *United States*, 513 U.S. 150 (1995).....34
Turner v. *Murray*, 476 U.S. 28 (1986).....38
United States v. *Benally*,
546 F.3d 1230 (10th Cir. 2008),
cert. denied, 558 U.S. 1051 (2009).....39
United States v. *Boney*,
68 F.3d 497 (D.C. Cir. 1995) 46, 47
United States v. *Boone*, 458 F.3d 321 (3d Cir. 2006).....41
United States v. *Brooks*, 727 F.3d 1291 (10th Cir.),
cert. denied, 134 S. Ct. 835 (2013).....44
United States v. *Burr*,
25 F. Cas. 49 (C.C.D. Va. 1807).....18, 19
United States v. *Davila*, 133 S. Ct. 2139 (2013) 22
United States v. *Ebron*, 683 F.3d 105 (5th Cir. 2012),
cert. denied, 134 S. Ct. 512 (2013).....20, 41
United States v. *Fulks*, 454 F.3d 410 (4th Cir. 2006),
cert. denied, 551 U.S. 1147 (2007).....44
United States v. *Martinez-Salazar*,
528 U.S. 304 (2000).....21
United States v. *Texas*, 507 U.S. 529 (1993).....34
United States v. *Villar*, 586 F.3d 76 (1st Cir. 2009) 39, 44
Vaise v. *Delaval*, 1 Term R. 11 (K.B. 1785).....23
Vasquez v. *Hillery*, 474 U.S. 254 (1986).....19
Williams v. *Bridges*,
35 P.2d 407 (Cal. Ct. App. 1934).....29

Constitution, statutes, and rules:

U.S. Const. Amend. VI .....*passim*

Page

Constitution, statutes, and rules—continued:

U.S. Const. Amend. VII 16
28 U.S.C. 1254(1) 1
Cal. Evid. Code § 1150(a) 42
Fla. Stat. Ann. § 90.607(2)(b) 42
Haw. Rev. Stat. § 626-1, R. 606(b) 42
Kan. Stat. Ann. § 60-441 42
Kan. Stat. Ann. § 60-444 42
Nev. Rev. Stat. § 50.065(2) 42
Fed. R. Evid. 606(b) ..... *passim*
Fed. R. Evid. 606(b)(1) ..... *passim*
Fed. R. Evid. 606(b)(2) 10, 40
Fed. R. Evid. 606(b)(2)(A) ..... *passim*
Fed. R. Evid. 606(b)(2)(B) 35
C.D. Cal. R. 83-3.1 43
C.D. Cal. R. 83-3.2.7 43
M.D. Fla. R. 9015-1(c) 42
S.D. Fla. R. 11.1(e) 43
C.D. Ill. R. 47.2(2) 43
N.D. Ill. R. Crim. P. 3.1 43
S.D. Ill. R. 53.1 43
E.D.N.C. R. Civ. P. 47.1(c) 43
M.D.N.C. R. 47.1(b)(4) 43
W.D.N.C. R. Civ. P. 47.1(D) 43
S.D. Ohio R. 47.1 43
D.S.D. R. 47.2 42
N.D. Tex. R. 47.1 43
E.D. Va. R. Civ. P. 47(C) 43
W.D. Va. R. 10 43
Cal. Rules of Prof'l Conduct R. 5-320(E) 43
Ill. Rules of Prof'l Conduct R. 3.5(c) 43
N.Y. Rules of Prof'l Conduct R. 3.5(a)(6) 43
N.C. Rules of Prof'l Conduct R. 3.5(a)(5) 43
Ohio Rules of Prof'l Conduct R. 3.5(a)(4) 43
Pa. Rules of Prof'l Conduct R. 3.5(c) 43
S.D. Rules of Prof'l Conduct R. 3.5(c) 43
Va. Rules of Prof'l Conduct R. 3.5(3) 43

Page

Miscellaneous:

W. W. Allen, *Admissibility, in Civil Case, of Juror's Affidavit or Testimony to Show Bias, Prejudice, or Disqualification of a Juror Not Disclosed on Voir Dire Examination*, 48 A.L.R.2d 971 (1956) 29
City of Sturgis, *Sturgis Motorcycle Rally* <www.sturgismotorcyclerally.com> (last visited May 27, 2014) 3
Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Preliminary Draft of Proposed Rules of Evidence for the United States District Courts and Magistrates (Mar. 1969) 31
Communication from the Chief Justice of the United States Transmitting the Proposed Rules of Evidence, H.R. Doc. No. 93-46 (1973) 32
Communication from the Chief Justice of the United States Transmitting Amendments to the Federal Rules of Evidence, H.R. Doc. No. 109-108 (2006) ..33, 34
117 Cong. Rec. 33,645 (1971) 32
117 Cong. Rec. 33,655 (1971) 32
Fed. R. Evid. 606 advisory committee's note (1972 proposed rules) 33
Valerie P. Hans & Neil Vidmar, *Judging the Jury* (1986) 16, 17, 18
H.R. Rep. No. 650, 93rd Cong., 1st Sess. (1973) 33, 36
H.R. Rep. No. 1597, 93rd Cong., 2d Sess. (1974) (Conf. Rep.) 33
Nancy S. Marder, *Deliberations and Disclosures: A Study of Post-Verdict Interviews of Jurors*, 82 Iowa L. Rev. 465 (1997) 40
Model Rules of Prof'l Conduct R. 3.5 43
Roger D. Moore, *Voir Dire Examination of Jurors: The English Practice*, 16 Geo. L.J. 438 (1927) 17
S. Rep. No. 1277, 93rd Cong., 2d Sess. (1974) 33
John Henry Wigmore, *Wigmore on Evidence* (McNaughton ed. 1961) 23, 24, 28

In the Supreme Court of the United States

No. 13-517

GREGORY P. WARGER, PETITIONER

v.

RANDY D. SHAUERS

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is reported at 721 F.3d 606. The order of the district court denying petitioner's motion for judgment as a matter of law or a new trial (Pet. App. 12a-39a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 24, 2013. The petition for a writ of certiorari was filed on October 22, 2013, and was granted on March 3, 2014. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

RULE INVOLVED

Federal Rule of Evidence 606(b) provides:

> (1) **Prohibited Testimony or Other Evidence.** During an inquiry into the validity of a verdict or indictment, a juror may not testify about any statement made or incident that occurred during the jury's deliberations; the effect of anything on that juror's or another juror's vote; or any juror's mental processes concerning the verdict or indictment. The court may not receive a juror's affidavit or evidence of a juror's statement on these matters.
>
> (2) **Exceptions.** A juror may testify about whether:
>
> > (A) extraneous prejudicial information was improperly brought to the jury's attention;
> >
> > (B) an outside influence was improperly brought to bear on any juror; or
> >
> > (C) a mistake was made in entering the verdict on the verdict form.

STATEMENT

This case presents an important question concerning the admissibility of evidence of a juror's dishonesty during voir dire. After a horrific accident in which respondent's truck collided with petitioner's motorcycle, resulting in the amputation of petitioner's leg, petitioner brought suit against respondent in the United States District Court for the District of South Dakota. After a mistrial due to the misconduct of respondent's counsel, the jury in the second trial returned a verdict in favor of respondent.

In response to questioning during voir dire, the woman who later became the jury foreperson, Regina Whipple, had indicated that she could remain impartial

and that she could award damages to petitioner for future medical expenses and pain and suffering if the evidence supported it. Shortly after trial, however, another juror approached petitioner's counsel and informed them that, during deliberations, Ms. Whipple had told the other jurors that her own daughter had been at fault in a fatal automobile accident—and that, if her daughter had been sued, it would have "ruined her life." The juror executed an affidavit recounting Ms. Whipple's statements and expressing concern both that Ms. Whipple was biased and that her statements had influenced other jurors during deliberations.

As is relevant here, relying on the juror's affidavit, petitioner moved for a new trial based on Ms. Whipple's dishonesty during voir dire. Under *McDonough Power Equipment, Inc.* v. *Greenwood*, 464 U.S. 548 (1984), a party is entitled to a new trial where a juror failed honestly to answer a material question during voir dire and a correct response would have provided a valid basis for a challenge for cause. The district court denied petitioner's motion, Pet. App. 12a-39a, and the court of appeals affirmed, *id.* at 1a-11a. Like the district court, the court of appeals held that juror testimony about statements made during deliberations that tend to show dishonesty during voir dire is inadmissible under Federal Rule of Evidence 606(b). Because that holding was incorrect, the judgment of the court of appeals should be reversed, and the case remanded for further proceedings on petitioner's motion for a new trial.

1. The Sturgis Motorcycle Rally is one of the largest events of its kind. Held annually in Sturgis, South Dakota, it attracts hundreds of thousands of motorcycle enthusiasts from around the world. See City of Sturgis, *Sturgis Motorcycle Rally* <www.sturgismotorcyclerally.com> (last visited May 27, 2014).

Petitioner is a computer systems engineer and former Navy officer from St. Louis, Missouri. An experienced motorcyclist, he traveled to South Dakota to attend the 2006 Sturgis Motorcycle Rally; he was also visiting his girlfriend, a medical resident living in nearby Rapid City. The accident at issue occurred on the morning of Friday, August 4, 2006, at the intersection of U.S. Highway 385 and Sheridan Lake Road, just outside Rapid City and not far from Mount Rushmore. At the time of the accident, petitioner was stopped at the intersection, waiting to turn left from Highway 385 onto Sheridan Lake Road. Respondent, a Utah resident, was approaching petitioner from behind in a truck that was pulling a 28-foot camper trailer; respondent was traveling downhill at a high rate of speed. Just before the accident, an off-duty officer traveling in the opposite direction noticed that respondent had not been looking at the road, and he was concerned that respondent would not be able to stop in time. Pet. App. 2a, 12a-13a, 17a-18a; Pet. C.A. Br. 3, 6-11.

Unfortunately, the officer's concern was well founded. Unable to stop, respondent attempted to go around petitioner, but he clipped petitioner's motorcycle with his trailer, hurling petitioner into a ditch. The officer saw the accident in his rearview mirror, turned around, and raced back to the scene. When the officer came upon petitioner, he was missing part of his left leg. Petitioner was airlifted to a Rapid City hospital and received extensive treatment for his injuries. Although petitioner ultimately survived, his lower leg was amputated, and he suffered numerous other serious injuries. As a result of the accident, he incurred more than $300,000 in immediate medical expenses, and will incur substantial additional costs—including costs associated with his prosthetic

leg—for the rest of his life. Pet. App. 2a, 12a-13a; Pet. C.A. Br. 3, 6-11; J.A. 16.

2. On December 12, 2008, petitioner brought suit against respondent in the United States District Court for the District of South Dakota, invoking the court's diversity jurisdiction and asserting a claim of negligence. Both parties requested a trial by jury. Pet. App. 2a, 13a.

a. The case was tried twice. The first trial ended in a mistrial after respondent's counsel violated an order prohibiting experts from offering legal opinions as to whether the parties' conduct violated South Dakota law. Pet. App. 2a, 13a-14a.[1]

b. The issue before this Court concerns alleged dishonesty during voir dire for the second trial. Voir dire proceeded in two phases, with questioning first by the judge and then by the attorneys; all of the prospective jurors were present in the courtroom while the questioning took place. The judge began by informing the jurors that "the key to this jury selection process is candor and honesty," J.A. 35, and by asking them to speak up if they had "personal opinions, biases, religious beliefs, notions of any kind about what the law is or should be, or about any of the matters which may be an issue in the case," J.A. 35-36. The judge then provided the jurors with a summary of the case, explaining that petitioner was seeking damages from respondent for injuries caused by a traffic accident. J.A. 38.

---

[1] Remarkably, during the second trial, respondent's counsel again violated the same order. Pet. App. 24a-25a. This time, however, the judge denied petitioner's motion for a mistrial, acknowledging that counsel's conduct had been "improper" but stating that he was "not going to mistry this case again if [I] can help it." *Id.* at 25a.

At that point, the judge asked whether, based on the summary, there was anyone in the jury pool who "from your experience or background feel[s] that you would not be a proper juror to hear this action." J.A. 38. In response, one of the prospective jurors, Raymond Reynolds, informed the judge that, based on his experience working in the field of emergency services, he did not believe he could be objective. J.A. 39. He added that, "even if [he were] trying to be objective," he would probably "still lean towards the side of what the actual reports from the investigating agency show." *Ibid.* When the judge asked Mr. Reynolds whether he could "set aside [his] experiences and hear fairly evidence presented by both sides as to the manner in which this collision occurred and who may responsible," he answered that he could not. *Ibid.* The judge accordingly excused Mr. Reynolds for cause. J.A. 40.

The judge explained to the remaining jurors that "Mr. Reynolds did exactly the right thing" when he "identified himself as having a problem [with] a case of this nature." J.A. 40. The judge asked again whether, based on the summary, there was anyone who "ha[s] any reason that * * * you would not be a proper juror to sit in a case of this kind." *Ibid.* No one responded. *Ibid.* The judge then asked whether there was anyone who would not be "able to render a verdict based solely and only on the law as I give it to you in my instructions." *Ibid.* Again, no one responded. *Ibid.* The judge repeated those questions at the conclusion of his phase of the voir dire, and elicited no responses. J.A. 45.

The judge next permitted counsel for both parties to question the prospective jurors directly. Both sides asked a series of questions designed to elicit any preconceived biases or views that might affect a juror's ability to serve fairly and impartially. A number of the remain-

ing jurors raised potential issues in response. For example, in response to questioning by petitioner's counsel about his ability to remain fair and impartial in a case of this type, Barton Goodwin stated that he had been involved in a serious automobile accident. J.A. 64. He later expressed the opinion that, based on that experience, he "would probably not be the right juror" for this type of case. J.A. 119. Respondent's counsel moved to strike Mr. Goodwin for cause, and the judge granted the motion. J.A. 120.

In response to similar questioning by petitioner's counsel, two prospective jurors volunteered that they had prior experiences with motorcycle accidents. Jamie Boje testified that she was a motorcycle rider and that, while she had never been involved in an accident herself, members of her family had. J.A. 72-73. She later stated that, based on her experiences as a rider, it would be "very hard for [her] to believe" that the accident was petitioner's fault. J.A. 110. Respondent's counsel moved to strike Ms. Boje for cause, and the judge granted the motion. J.A. 110-111.

Johnnie Knapp testified that he too was a motorcycle rider and that he had been in several accidents involving motorcycles, including one resulting in a death. J.A. 68-72. After both parties extensively questioned Mr. Knapp about his experiences, however, he testified that he could apply the law fairly. J.A. 68, 139-141. In light of those responses, neither party challenged Mr. Knapp for cause.

Another prospective juror, Judith Abdo, whose husband had been killed in a traffic accident, stated that she "always would have sympathy" for petitioner. J.A. 146. Respondent's counsel moved to strike Ms. Abdo for cause. J.A. 147. In response to extensive questioning by petitioner's counsel and the judge, however, Ms. Abdo

stated that she could follow the judge's instructions and decide the case fairly and impartially. J.A. 147-151. Based on that testimony, the judge denied the motion to strike Ms. Abdo. J.A. 151.

In addition to asking the prospective jurors whether there was any reason why they could not remain fair and impartial in a case of this type, petitioner's counsel specifically inquired as to whether any juror would be "uncomfortable awarding damages for pain and suffering." J.A. 86. Terry Whitmyre responded that she did not "feel somebody should have to pay" for an accident that "wasn't something done deliberate"; instead, she said, the victim should "bite the bullet and get going again." J.A. 88. Notwithstanding those views, Ms. Whitmyre assured the judge that she would "follow the law," and neither party challenged her for cause. *Ibid.* Other prospective jurors, including Regina Whipple, affirmatively stated that they could award damages for pain and suffering if the evidence supported it. J.A. 89.

In a similar vein, petitioner's counsel specifically inquired as to whether any prospective juror had a "concern" about awarding damages for future medical expenses, such as petitioner's prosthetic device and medications. J.A. 83. Grant Guthrie wondered whether it would be fair to award such damages "if it completely wipes [respondent] out"; as he put it, "if it's an accident[,] why should [respondent] and his family suffer forever?" J.A. 84. Like Ms. Whitmyre, however, Mr. Guthrie stated that he understood that the jury's duty was to decide on liability and, if required, an appropriate measure of damages, and neither party challenged him for cause. *Ibid.* Again, other prospective jurors, including Ms. Whipple, affirmatively stated that they could award damages for future medical expenses if the evidence supported it. J.A. 83.

c. Following voir dire, each side exercised its peremptory challenges and the judge empaneled a twelve-person jury. J.A. 188. Ms. Whipple was selected to serve as the jury foreperson. At the conclusion of trial, the jury returned a verdict in favor of respondent. Pet. App. 3a, 14a.

3. Less than a week after the jury returned its verdict, one of the jurors, Stacey Titus, stopped by the office of petitioner's counsel in Rapid City. Petitioner's counsel immediately recognized Mr. Titus as one of the jurors and advised him that, under the local rules, they were prohibited from having any contact until the judge had released the jurors from further service. Petitioner's counsel subsequently asked the judge to release the jurors; after the judge did so, petitioner's counsel met with Mr. Titus. Pet. App. 40a; Pet. D. Ct. Mot. for New Trial 10 (Oct. 25, 2010).

At the meeting, Mr. Titus expressed concern about statements made by the jury foreperson, Ms. Whipple, during the jury's deliberations. Specifically, Mr. Titus alleged that Ms. Whipple had told the other jurors that her own daughter had been at fault in a fatal automobile accident—and that, if her daughter had been sued, it would have "ruined her life." According to Mr. Titus, Ms. Whipple explained that her daughter had visited with the family of the dead motorist and had given them flowers on the fifth anniversary of the accident. Mr. Titus expressed concern not only that Ms. Whipple was herself biased, but also that Ms. Whipple's statements had influenced other jurors, insofar as those jurors "also expressed their concern about ruining the * * * l[ives] [of respondent and his wife] as they were a young couple." Mr. Titus executed an affidavit in which he made all of the foregoing allegations. Pet. App. 3a, 28a-29a; C.A. App. 121; see Pet. App. 40a-41a (affidavit).

4. As is relevant here, relying on Mr. Titus's affidavit, petitioner moved for a new trial based on the foreperson's dishonesty during voir dire. The district court denied the motion, concluding that Federal Rule of Evidence 606(b) barred the admission of Mr. Titus's affidavit. Pet. App. 12a-39a.[2]

The district court held that the affidavit was inadmissible under Rule 606(b)(1), which prohibits the introduction of juror testimony about statements made during jury deliberations "[d]uring an inquiry into the validity of [the] verdict." Pet. App. 35a-38a. In so doing, the court rejected petitioner's contention that he was seeking admission of the affidavit not to "inquire into the validity of the verdict," but rather to "demonstrate the foreperson lied during voir dire." *Id.* at 35a-36a. The court reasoned that such testimony "fell within the ambit of Rule 606(b) because the jurors made the statements during the course of jury deliberations, regardless of the purpose for which [the moving party] sought to use the information." *Id.* at 36a, 38a. "To allow statements made during jury deliberations to be used to challenge a juror's conduct during voir dire," the court continued, "would undermine the purpose of Rule 606(b) and runs counter to its directive." *Id.* at 38a.

The district court also held that, to the extent the affidavit was inadmissible under Rule 606(b)(1), it did not qualify for admission under any of the exceptions in Rule 606(b)(2), including the exception in Rule 606(b)(2)(A) for

---

[2] Petitioner also moved on other grounds for judgment as a matter of law or a new trial. The district court rejected petitioner's arguments, see Pet. App. 14a-27a, as did the court of appeals, see *id.* at 3a-5a, 6a. Petitioner has not renewed those arguments before this Court.

evidence that "extraneous prejudicial information was improperly brought to the jury's attention." Pet. App. 31a-35a. The court determined that "[t]he type of biases the foreperson allegedly expressed in this case, while unfortunate, do not fall within any exception to Rule 606(b)." *Id.* at 34a.

5. The court of appeals affirmed. Pet. App. 1a-11a. Like the district court, the court of appeals rejected the contention that Rule 606(b)(1) "should not exclude the affidavit because it is not being used to challenge the verdict, but rather to show a juror was dishonest during voir dire." *Id.* at 8a. The court of appeals found "persuasive" the reasoning of other courts that had held that "trial courts may exclude such evidence." *Id.* at 8a-9a. The court explained that "allowing juror testimony through the backdoor of a voir dire challenge risks swallowing the rule." *Id.* at 9a (citation omitted).

Also like the district court, the court of appeals held that, to the extent the affidavit was inadmissible under Rule 606(b)(1), it did not qualify for admission under the exception in Rule 606(b)(2)(A) for evidence that "extraneous prejudicial information was improperly brought to the jury's attention." Pet. App. 6a-7a. "Upon first blush," the court conceded, "it would seem the foreperson's comments fall into this category." *Id.* at 7a. The court ultimately determined, however, that "[j]urors' personal experiences do not constitute extraneous information." *Ibid.* Instead, "extraneous information includes objective events such as publicity and extra-record evidence reaching the jury room, and communication or contact between jurors and litigants, the court, or other third parties." *Ibid.* (internal quotation marks and citation omitted). Because the affidavit "concerns an alleged bias held by a jury member" and "does not concern extraneous information improperly brought before the

jury," the court concluded that "the exception to the rule does not apply." *Ibid.*

SUMMARY OF ARGUMENT

This case presents the question whether Federal Rule of Evidence 606(b) permits a party moving for a new trial based on juror dishonesty during voir dire to introduce juror testimony about statements made during deliberations that tend to show the alleged dishonesty. The court of appeals erred in this case by holding that such testimony is inadmissible.

I. Rule 606(b)(1) permits the introduction of such testimony because an inquiry into juror dishonesty during voir dire does not constitute an "inquiry into the validity of the verdict."

A. The practice of voir dire safeguards the constitutional right to trial by an impartial jury. The right to challenge jurors through voir dire is a central and uniquely American component of the trial process. For voir dire to serve its purpose of exposing the biases of prospective jurors, it is obviously necessary that prospective jurors give truthful answers to the questions they are asked.

To ensure that litigants receive the benefit of truthful voir dire answers, this Court held in *McDonough Power Equipment, Inc.* v. *Greenwood*, 464 U.S. 548 (1984), that a party is entitled to a new trial upon demonstrating that (1) a juror failed to answer honestly a material question on voir dire and (2) a correct response would have provided a valid basis for a challenge for cause. Notably, a party that satisfies those two requirements is entitled to a new trial without regard to whether the juror's dishonesty (or mere participation in the jury) actually affected the verdict. Put another way, the *McDonough* inquiry begins and ends with what happened during voir dire:

once a court determines that the dishonest juror would have been subject to a valid challenge for cause, its inquiry is complete.

Federal Rule of Evidence 606(b), by contrast, focuses not on the composition of the jury, but on its ultimate product: the verdict. By its terms, and subject to certain enumerated exceptions, Rule 606(b) excludes juror testimony regarding "any statement made or incident that occurred during the jury's deliberations" only where that testimony is sought to be used "during an inquiry into the validity of a verdict or indictment." Where a court is not engaged in an "inquiry into the validity of a verdict," a juror may testify freely about the jury's deliberations.

This case does not fall into the narrow category of cases in which Rule 606(b) excludes juror-deliberation testimony. Because petitioner sought to admit a juror's affidavit for the purpose of establishing under *McDonough* that another juror was dishonest during voir dire, the district court was not required, or even permitted, to conduct an "inquiry into the validity of [the] verdict." The court of appeals therefore erred by concluding that Rule 606(b) barred admission of the affidavit.

B. The principle that juror testimony about deliberations is admissible to show dishonesty during voir dire is rooted in the common law. In its most widely adopted version, the rule at common law simply barred jurors from testifying about the process by which the verdict was reached. And courts repeatedly held that the common-law rule did not apply when juror testimony was being introduced to prove dishonesty during voir dire. Most notably, in *Clark* v. *United States*, 289 U.S. 1 (1933), this Court held that such testimony was admissible in a contempt proceeding against an allegedly dishonest juror. Applying *Clark*, other courts subsequently

held that such testimony was also admissible in the context of a motion for a new trial.

C. Rule 606(b) is a direct successor to the common-law rule, and there is no indication that the drafters of Rule 606(b) intended to broaden that rule to bar the admission of testimony tending to show juror dishonesty during voir dire. To the contrary, the drafters appear to have assumed that Rule 606(b), like its common-law predecessor, would bar only the use of juror testimony to challenge how the verdict was reached. While there was vigorous debate about the scope of Rule 606(b) leading up to its adoption, the drafters never so much as mentioned either the rule of *Clark* or voir dire more generally. And *Tanner* v. *United States*, 483 U.S. 107 (1987)—the sole decision in which this Court has construed Rule 606(b)—is not to the contrary. If anything, *Tanner* implicitly reaffirmed *Clark*'s basic holding that juror testimony is admissible to prove that a juror lied during voir dire.

D. Principles of constitutional avoidance counsel in favor of petitioner's reading of Rule 606(b). Voir dire can be sufficient only if prospective jurors provide truthful answers. Where they fail to do so, the end result is a violation of the litigant's right to an impartial jury. That constitutional concern is only heightened in an especially common category of cases of juror dishonesty during voir dire: cases of dishonesty involving racial bias, often arising in the criminal context. While this case does not involve such bias, this Court has made clear that the canon of constitutional avoidance requires it to consider all the necessary consequences of its interpretive choice. Here, the foregoing constitutional concerns should lead the Court to resolve any doubt regarding the proper interpretation of the rule in petitioner's favor.

E. Permitting juror testimony in support of a *McDonough* claim of juror dishonesty during voir dire would not undermine the policy goals that undergird Rule 606(b): encouraging free and frank discussion during deliberations, prohibiting post-verdict harassment of jurors by the losing party, and promoting the finality of verdicts. Petitioner's interpretation of the Rule would not chill juror deliberations, because juror testimony is already admissible in a variety of circumstances. Nor would petitioner's interpretation lead to juror harassment, because state ethical rules and local court rules already strictly circumscribe the contact parties and their counsel may have with jurors. And petitioner's interpretation would not upset the finality of verdicts, because merely admitting evidence that tends to show juror dishonesty during voir dire would not automatically entitle a party to a new trial under *McDonough*. Past experience confirms that petitioner's interpretation would not undermine the policies behind Rule 606(b): although petitioner's interpretation has been the law in a number of jurisdictions—including in the Ninth Circuit for almost three decades—there is no evidence that such an interpretation has led to juror harassment or other problems.

II. Finally, should this Court conclude that Rule 606(b)(1) does not permit the introduction of juror testimony about dishonesty during voir dire, it should hold that such testimony is admissible under the "extraneous prejudicial information" exception in Rule 606(b)(2)(A). Statements made during deliberations about information that would have disqualified the juror from jury service qualify as "extraneous prejudicial information" that was "improperly brought to the jury's attention." Under Rule 606(b)(2)(A), as under Rule 606(b)(1), the affidavit at issue should have been admitted. Because the court of

appeals' contrary interpretation of Rule 606(b) was erroneous, this Court should reverse the judgment below and remand so that the district court can reconsider petitioner's *McDonough* claim in light of the improperly excluded evidence.

ARGUMENT

I. JUROR TESTIMONY ABOUT STATEMENTS MADE DURING DELIBERATIONS THAT TEND TO SHOW DISHONESTY DURING VOIR DIRE IS ADMISSIBLE UNDER FEDERAL RULE OF EVIDENCE 606(B)(1)

A. An Inquiry Into Juror Dishonesty During Voir Dire Does Not Constitute An 'Inquiry Into The Validity Of A Verdict' For Purposes Of Rule 606(b)(1)

1. It is a bedrock principle of constitutional law that "[t]he American tradition of trial by jury, considered in connection with either criminal or civil proceedings, necessarily contemplates an *impartial* jury." *Thiel* v. *Southern Pacific Co.*, 328 U.S. 217, 220 (1946) (emphasis added). The Sixth Amendment expressly guarantees criminal defendants the right to trial "by an impartial jury." U.S. Const. Amend. VI. And the Seventh Amendment preserves the common-law right to trial by jury for civil litigants in federal court. U.S. Const. Amend. VII. Although the Seventh Amendment does not specifically provide that civil litigants are entitled to an "impartial" jury, that right inheres in the right to a jury trial itself, see, *e.g.*, *Thiel*, 328 U.S. at 220, as well as in the broader right to due process, see, *e.g.*, *Sheppard* v. *Maxwell*, 384 U.S. 333, 362 (1966).

The right to an impartial jury is safeguarded by the familiar practice of voir dire. Although "the American jury began as a direct transplant from Mother England," the practice of voir dire is a uniquely American one. Valerie P. Hans & Neil Vidmar, *Judging the Jury* 32 (1986)

(Hans & Vidmar). While the concept of the right to a trial by jury existed under English law, parties did not maintain a right to an impartial jury. See *id.* at 31-32. Under the English system, it was recognized practice for the county sheriff—a representative of the Crown—to "dr[a]w up the jury list for the trial." *Id.* at 35. English courts "had long accepted the notion that in criminal trials * * * it was quite acceptable, even laudable, for the sheriff to choose jurors partial to the Crown." *Ibid.*

Under the English system, moreover, a party could challenge prospective jurors for cause only on relatively limited grounds. A criminal defendant, for example, could challenge a prospective juror based on a familial relationship with one of the parties; incompetence, such as where the juror was not of the prescribed age; or criminality, where the juror had been convicted of an "infamous" offense. Hans & Vidmar 35; Roger D. Moore, *Voir Dire Examination of Jurors: The English Practice*, 16 Geo. L.J. 438, 441 (1927) (Moore). And a party could challenge a prospective juror based only on personal acquaintance or reputation; a party was generally not permitted to engage in pretrial questioning of prospective jurors, on the theory that "such questions would bring discredit to the jurors who, after all, [are] not on trial." Hans & Vidmar 35; see Moore 441, 445.

As political dissent reached a fever pitch in the American colonies, "more and more trials having political significance appeared in colonial courts," and the Crown sought to secure convictions largely by "stack[ing] the juries with Tory sympathizers." Hans & Vidmar 35. In 1760, responding to the Crown's abuses of the jury system, the Massachusetts colonial legislature passed the Jury Selection Law, a precursor to modern voir dire. *Id.* at 35-36. Under that law, the pool from which jurors were selected was established by town meeting; as a pre-

requisite, jurors were subjected to questioning that "helped to expose their character and biases." *Id.* at 36. The Jury Selection Law initially helped to thwart the Crown's efforts to stack juries, but the British Parliament responded in 1774 by overriding the law and placing jury selection back in the hands of the Crown. *Ibid.*

Following the Revolution, the Framers were of one mind that, "in a pretrial hearing[] or *voir dire*, * * * defendants should have the right to challenge and reject jurors for their general attitudes as well as specific interests in the case." Hans & Vidmar 37-38. In fact, the House of Representatives' original draft of the Bill of Rights expressly provided that the right to an "impartial jury" included "the right of challenge." *Id.* at 37. In the debates on the Bill of Rights, Patrick Henry went so far as to say that such a right was "as valuable as the [right to] trial by jury itself." *Ibid.* Although the final version of the Sixth Amendment did not expressly contain such a right, that was largely because the right was viewed as redundant with the guarantee of an "impartial jury"; in the words of James Madison, "[t]he right to challenge is incident to the trial by jury, and, therefore, as one is secured, so is the other." *Ibid.*

Since the Founding, the right to challenge jurors through voir dire has remained a central component of the American trial process. In 1807, Chief Justice Marshall, presiding over the treason trial of former Vice President Aaron Burr, reasoned that a criminal defendant maintains a right to challenge jurors whose "strong and deep impressions * * * will close the mind against the testimony that may be offered in opposition to them," because such jurors are not "impartial" in the "constitutional sense of that term." *United States* v. *Burr*, 25 F. Cas. 49, 51 (C.C.D. Va. 1807). Chief Justice Marshall explained that the right to challenge jurors was neces-

sary to protect "[t]he great value of the trial by jury": namely, "its fairness and impartiality." *Id.* at 50. More recently, this Court has described voir dire as playing a "critical function" in ensuring that "[the] right to an impartial jury will be honored." *Rosales-Lopez* v. *United States*, 451 U.S. 182, 188 (1981).

2. Voir dire requires prospective jurors to answer questions geared toward exposing their biases. For voir dire to serve its purpose, it is obviously necessary that prospective jurors give truthful answers to those questions. In *McDonough Power Equipment, Inc.* v. *Greenwood*, 464 U.S. 548 (1984), this Court established a standard for determining when a party that subsequently discovers evidence of dishonesty during voir dire is entitled to a new trial. Specifically, the Court held that a party should receive a new trial upon demonstrating that (1) "a juror failed to answer honestly a material question on *voir dire*" and (2) "a correct response would have provided a valid basis for a challenge for cause." *Id.* at 556.

Critically for purposes of this case, a party that satisfies those two requirements is entitled to a new trial without regard to whether the juror's dishonesty (or mere participation in the jury) actually affected the verdict. *McDonough*, 464 U.S. at 556. That is because, where a juror was materially dishonest during voir dire, the resulting empanelment of the dishonest juror necessarily pollutes the subsequent trial. *Ibid.*; cf. *Vasquez* v. *Hillery*, 474 U.S. 254, 263 (1986) (explaining that, "when a petit jury has been selected upon improper criteria[,] * * * the effect of the violation cannot be ascertained"); *Thiel*, 328 U.S. at 225 (concluding that, when a jury is empaneled using an improperly limited jury pool, reversal is warranted regardless of "whether the [movant] was in any way prejudiced by the wrongful exclusion"). In other words, the *McDonough* inquiry begins

and ends with what happened during voir dire: as soon as a court determines that the dishonest juror would have been subject to a valid challenge for cause, its inquiry is complete. See 464 U.S. at 556.

3. Federal Rule of Evidence 606(b), by contrast, focuses not on the composition of the jury, but on its ultimate product: the verdict. By its terms, and subject to certain enumerated exceptions, Rule 606(b) excludes juror testimony regarding "statement[s] made or incident[s] that occurred during the jury's deliberations" only where the testimony is sought to be used "[d]uring an inquiry into the validity of a verdict or indictment." Fed. R. Evid. 606(b)(1).

Consistent with the plain language of the rule, where a court is not engaged in an "inquiry into the validity of a verdict," a juror may testify freely about the jury's deliberations. Perhaps most notably for present purposes, juror testimony about deliberations has long been admissible to show dishonesty during voir dire in the context of contempt proceedings against the allegedly dishonest juror. See *Clark* v. *United States*, 289 U.S. 1, 12-14 (1933); pp. 26-28, *infra*. More generally, juror testimony about deliberations may be used *before* a verdict is reached, to determine whether the jury is in fact deliberating according to the judge's instructions, see, *e.g.*, *Tanner* v. *United States*, 483 U.S. 107, 127 (1987); *United States* v. *Ebron*, 683 F.3d 105, 125-126 (5th Cir. 2012), cert. denied, 134 S. Ct. 512 (2013), or whether the possibility of consensus remains where the jury is seemingly deadlocked, see, *e.g.*, *Lowenfield* v. *Phelps*, 484 U.S. 231, 234 (1988). And nothing in Rule 606(b) prohibits a juror from testifying in a *different* proceeding about a "statement made" or "incident that occurred" during jury deliberations. If, for example, one juror assaulted another during deliberations, Rule 606(b) would hardly entitle

the assailant to exclude any eyewitness testimony about the assault in a later prosecution. Rule 606(b) thus excludes juror testimony about deliberations only in a narrow and exceptional category of cases: *viz.*, where the testimony is sought to be used as a part of an "inquiry into the validity of [the] verdict."

4. Where a party seeks to present juror testimony about deliberations to establish material dishonesty during voir dire under *McDonough*, the party is not seeking to "inquir[e] into the validity of [the] verdict." Fed. R. Evid. 606(b)(1). Properly understood, the *McDonough* "inquiry" has nothing to do with the jury's verdict at all. As explained above, the party raising a *McDonough* claim need not demonstrate that the juror's dishonesty actually affected the verdict, or indeed that the juror's empanelment had any effect whatsoever on the trial. Nor may the party *opposing* a *McDonough* claim prevail on the ground that any error was harmless because the error did not influence the verdict. The conclusion that a party raising a *McDonough* claim is not seeking to "inquir[e] into the validity of [the] verdict" flows naturally from the structural nature of a *McDonough* error: like other errors involving the empanelment of the jury, the seating of a dishonest juror warrants relief regardless of "whether the [moving party] was in any way prejudiced" during the subsequent trial. *Thiel*, 328 U.S. at 225; see *United States* v. *Martinez-Salazar*, 528 U.S. 304, 316 (2000) (stating that, where a "District Court's ruling result[s] in the seating of any juror who should have been dismissed for cause[,] * * * that circumstance would *require* reversal") (emphasis added).

To be sure, the result of a successful *McDonough* claim is that the moving party is entitled to vacatur of the judgment and a new trial. But a new trial is simply the *remedy* for a *McDonough* error. The focus of Rule

606(b)(1) is not on the remedy for the claim at issue; it is on the "inquiry" in which a court must engage to resolve that claim in the first instance. And for a *McDonough* claim, that "inquiry" is limited to what happened at voir dire. Put another way, the availability of a new-trial remedy once the inquiry has been completed hardly transforms an inquiry into juror dishonesty during voir dire into an inquiry into the validity of the verdict.

Other examples illustrate the point. Litigants may obtain a new trial as a remedy for a whole host of errors that (like *McDonough* error) have nothing to do with the jury's verdict. As discussed above, if a litigant shows that the jury was empaneled using an improperly limited jury pool, a new trial is warranted regardless of "whether the [movant] was in any way prejudiced by the wrongful exclusion." *Thiel*, 328 U.S. at 225. And outside the context of jury errors, a criminal defendant is automatically entitled to a new trial if he can establish "denial of counsel of choice, denial of self-representation, [or] denial of a public trial." *United States* v. *Davila*, 133 S. Ct. 2139, 2149 (2013). In each of those situations, as in *McDonough*, the claimed error is entirely discrete from the verdict at trial. It would be passing strange to characterize all of those situations as necessitating "inquir[ies] into the validity of [the] verdict" simply because, *after* the relevant inquiry, a successful movant would be entitled to a new trial as a *remedy*.

As is relevant here, petitioner sought to admit Mr. Titus's affidavit to establish that Ms. Whipple was dishonest during voir dire. In considering petitioner's *McDonough* claim, the district court was not required, or for that matter even allowed, to conduct an "inquiry into the validity of [the] verdict." Fed. R. Evid. 606(b)(1); see *McDonough*, 464 U.S. at 556. And because Rule 606(b) excludes evidence only during an inquiry into the validity

of the verdict, the rule could not have barred admission of Mr. Titus's affidavit. The court of appeals erred in concluding otherwise, and petitioner should have been permitted to introduce the affidavit in support of his *McDonough* claim.

B. The Common-Law Predecessor To Rule 606(b) Did Not Exclude Juror Testimony About Dishonesty During Voir Dire

The principle that juror testimony about deliberations is admissible to show dishonesty during voir dire has deep roots in history. The common-law precursor to Rule 606(b)—which originated in eighteenth-century England—had nothing to do with inquiries into the composition or empanelment of the jury. Instead, the common-law rule simply barred jurors from testifying about the process by which the verdict was reached. And unsurprisingly, in light of the central importance of voir dire to the American justice system, courts applying the common-law rule have long admitted juror testimony about deliberations for the purpose of showing juror dishonesty during voir dire.

1. The Common-Law Rule Narrowly Focused On Impeachment Of The Verdict

The common-law precursor to Rule 606(b) made a "gradual appearance * * * in the early 1700s" and then experienced a "rapid spread * * * in the last quarter of the 1700s," thanks to the "constant patronage" of the legendary English jurist Lord Mansfield. 8 John Henry Wigmore, *Wigmore on Evidence* § 2352, at 696 (McNaughton ed. 1961) (Wigmore).

Lord Mansfield's version of the common-law rule broadly provided that "a witness shall not be heard to allege his own turpitude." 8 Wigmore § 2352, at 695-696 (emphasis omitted). In *Vaise* v. *Delaval*, 1 Term R. 11

(K.B. 1785), Lord Mansfield held inadmissible a post-trial affidavit from two jurors stating that the jury had reached its verdict by flipping a coin. See 8 Wigmore § 2352, at 696 n.1. There, applying the rule that a witness may not testify to his own turpitude, Lord Mansfield reasoned that the court could not "receive such an affidavit from any of the jurymen themselves, in all of whom such conduct is a very high misdemeanor." *Ibid.* Instead, the court "must derive * * * knowledge [of the facts] from some other source, such as some person having seen the transaction through a window, or by some other means." *Ibid.*

Although the general prohibition on a witness's testifying to his own turpitude was later repudiated, a narrower form of Lord Mansfield's rule gained wide acceptance in both England and the United States, having been refined to what is essentially still the rule today: a prohibition against "[j]urors impeaching their verdict." 8 Wigmore § 2352, at 695-696. Thus narrowed, the rule survived because "new supposed reasons of policy were found, which buoyed up Lord Mansfield's rule long after the general repudiation of [his] favorite maxim." *Id.* at 696. Those new policy reasons included the considerations—reflected in this Court's own decisions on the admissibility of juror testimony—that barring jurors from testifying to impeach a verdict encourages free and frank discussion during deliberations, prohibits post-verdict harassment of jurors by the losing party, and promotes the finality of verdicts. *McDonald* v. *Pless*, 238 U.S. 264, 267-268 (1915); see *Tanner*, 483 U.S. at 119-120 (citing *McDonald*); 8 Wigmore § 2352, at 698 (same).

This Court repeatedly applied the common-law rule to prohibit jurors from impeaching their verdicts: that is, to prevent juror testimony from being introduced to prove that a verdict was reached through improper

means. In *McDonald*, for example, the Court affirmed the exclusion of juror affidavits stating that the jury had calculated damages improperly. 238 U.S. at 265. Similarly, in *Hyde* v. *United States*, 225 U.S. 347 (1912), the Court affirmed the exclusion of juror testimony regarding allegations that a guilty verdict against two out of three defendants had been the product of a compromise between jurors who wished to convict all three defendants and jurors who wished to acquit them. *Id.* at 383-384.

Summarizing the common-law rule, the Court explained that "the testimony of jurors should not be received to show matters" that "essentially inhere in the verdict itself" and thus "necessarily depend upon [juror] testimony." *Hyde*, 225 U.S. at 384. At the same time, however, the Court cautioned that "it would not be safe to lay down any inflexible rule" restricting juror testimony, because "there might be instances in which such testimony of the juror could not be excluded without violating the plainest principles of justice." *McDonald*, 238 U.S. at 268-269 (internal quotation marks omitted).

2. *Courts Applying The Common-Law Rule Admitted Juror Testimony About Dishonesty During Voir Dire*

Of particular import here, courts applying the common-law rule repeatedly held that the rule did not apply when juror testimony was being introduced to prove dishonesty at voir dire. That line of cases—headlined by this Court's decision in *Clark*—reflected two separate common-law principles: first, that the common-law rule applied only to matters that "inhere in the verdict itself," *Hyde*, 225 U.S. at 384, and second, that juror testimony concerning dishonesty during voir dire must be admissi-

ble to "preserv[e] trial by jury * * * against the inroads of corruption." *Clark*, 289 U.S. at 16.

a. In *Clark*, this Court considered whether juror testimony about deliberations was admissible in a contempt proceeding against Genevieve Clark, one of the jurors in a criminal fraud case. 289 U.S. at 6, 12-19. The fraud case ended in a mistrial after the jury became deadlocked, with Ms. Clark casting the lone vote to acquit. *Id.* at 9.

Following the mistrial, the government charged Ms. Clark with criminal contempt, alleging that "her answers upon the voir dire examination were willfully and corruptly false." 289 U.S. at 9. Specifically, the government alleged that Ms. Clark had given dishonest answers to two categories of voir dire questions. First, when asked if "she had ever been in any business of any kind," Ms. Clark responded vaguely that she "ha[d] been a stenographer before [her] marriage." *Id.* at 8. She did not disclose, however, that she had been a stenographer for the very company that had employed the defendants in that case. *Id.* at 7, 10. Second, Ms. Clark was asked whether "her mind was free from bias" and whether "she would be able and willing to base her verdict on the evidence and the law as given to her by the court." *Id.* at 8. Ms. Clark answered yes to those questions, and she was seated as a juror. *Ibid.*

In the contempt proceeding, the government sought to introduce juror testimony that, "[d]uring the deliberations of the jury," Ms. Clark had announced her categorical unwillingness to vote in favor of the government or to consider the views of her fellow jurors. 289 U.S. at 9. The district court admitted the evidence and ultimately convicted Ms. Clark of contempt, determining that she had "deliberately and intentionally conceal[ed] the fact that she had been employed * * * by [the defendants'

company]" and that she had "stat[ed] falsely that she was free from bias and that her verdict would be based only upon the evidence." *Id.* at 9-10 (internal quotation marks omitted).

In an opinion written by Justice Cardozo, this Court affirmed the conviction. 289 U.S. at 20. Voir dire, the Court explained, served the function of ensuring an "impartial arbiter" for litigants. *Id.* at 11. "The judge who examines on the voir dire," the Court continued, "is engaged in the process of organizing the court." *Ibid.* Where a juror gives "willfully evasive or knowingly untrue" answers to questions at voir dire, the juror "is a juror in name only." *Ibid.* By giving dishonest answers at voir dire, Ms. Clark had "doom[ed] * * * the trial from the beginning," *ibid.*; "trifled with the court of which she was a part," *id.* at 12; and "made its processes a mockery," *ibid.*

In holding that Ms. Clark's dishonesty during voir dire constituted contempt, the Court rejected her contention that the district court had erred by admitting evidence of her statements during deliberations. 289 U.S. at 12-19. Citing various cases, the Court explained that the common-law rule that "the testimony of a juror is not admissible for the impeachment of his verdict" is "not without exceptions." *Id.* at 18. Notably, one of the "exceptions" recognized by the Court came in *Hyman* v. *Eames*, 641 F. 676 (C.C.D. Colo. 1890), a case where, as here, the plaintiff sought a new trial based largely on juror affidavits swearing that, during deliberations, a juror had made statements indicating he concealed his biases during voir dire. *Id.* at 677. The *Hyman* court admitted the affidavits, holding that "the familiar rule that jurors shall not be allowed to impeach their verdict" did not apply where the court was "considering the *competency*" of a dishonest juror to "sit as a juror" in the first instance.

Id. at 677-678 (emphasis added). In *Clark*, however, the Court explained that it had no need to apply the *Hyman* "exception" (or any other) for a threshold reason: the trial in which Ms. Clark had been empaneled ended in a mistrial, and thus "there was no verdict * * * to be impeached." 289 U.S. at 18.

Of particular note here, the Court also rejected Ms. Clark's broader argument that juror testimony about her statements during deliberations was inadmissible under a privilege shielding the "arguments and votes of jurors." 289 U.S. at 12. The Court reasoned that any such privilege would not apply where "the relation giving birth to it has been fraudulently begun or fraudulently continued." *Id.* at 13-14. Where, as here, a juror's relationship to the court is "merely a sham and a pretense," the juror could not "invoke a relation dishonestly assumed as a cover and cloak for the concealment of truth." *Id.* at 14.

The Court acknowledged that certain policy considerations would support excluding juror testimony about deliberations. 289 U.S. at 13-14. Specifically, the Court noted that, "if jurors were made to feel that their arguments and ballots were to be freely published," "[f]reedom of debate might be stifled and independence of thought checked." *Id.* at 13. The Court ultimately rejected those considerations, however, on the ground that they must "yield to the overmastering need, so vital in our polity, of preserving trial by jury in its purity against the inroads of corruption." *Id.* at 14, 16.

b. As this Court did in *Clark*, a number of state courts applying the common-law rule also admitted juror testimony concerning dishonesty during voir dire. See 8 Wigmore § 2352, at 712 n.5 (citing cases). And critically, several of those courts read *Clark* to render such testimony admissible not only in contempt proceedings, but

also in precisely the situation presented here: *viz.*, where a party was seeking a new trial based on dishonesty during voir dire. See, *e.g.*, *State by Lord* v. *Hayden Miller Co.*, 116 N.W.2d 535, 539 (Minn. 1962); *Shipley* v. *Permanente Hospitals*, 274 P.2d 53, 56-57 (Cal. Ct. App. 1954); *Mathisen* v. *Norton*, 60 P.2d 1, 2-4 (Wash. 1936) (en banc); *Williams* v. *Bridges*, 35 P.2d 407, 408-409 (Cal. Ct. App. 1934). As the Illinois Supreme Court put it, the "generally recognized" rule that "jurors' affidavits may not be used to impeach their verdict" is "subject to an exception when it is charged that a juror has answered falsely on voir dire about a matter of potential bias or prejudice." *Department of Public Works & Buildings* v. *Christensen*, 184 N.E.2d 884, 887 (Ill. 1962) (citations omitted).[3]

The foregoing decisions are entirely consistent with the common-law rule's narrow focus on how the jury came to its verdict. As discussed above, voir dire has nothing to do with the way in which a jury reaches its verdict; instead, voir dire is a pretrial procedure that does not "essentially inhere in the verdict itself." *Hyde*, 225 U.S. at 384. A party seeking to introduce juror testimony to prove dishonesty during voir dire is not seeking to impeach the verdict, but rather to vindicate the underlying right to an impartial jury. Accordingly, the prevailing common-law practice—particularly after

---

[3] To be sure, some courts did reach the opposite conclusion, refusing to admit juror testimony concerning dishonesty during voir dire. See W.W. Allen, *Admissibility, in Civil Case, of Juror's Affidavit or Testimony to Show Bias, Prejudice, or Disqualification of a Juror Not Disclosed on Voir Dire Examination*, 48 A.L.R.2d 971, § 2 (1956). To the extent courts continued to reach that conclusion after *Clark*, however, the majority of them did not consider the import of *Clark*—or even cite it.

Clark—was to admit juror testimony to prove dishonesty during voir dire.

C. The Drafting History And Subsequent Interpretation Of Rule 606(b) Support The Conclusion That Juror Testimony About Dishonesty During Voir Dire Is Admissible

Rule 606(b) is a direct successor to the "common-law rule against admission of jury testimony to impeach a verdict." *Tanner*, 483 U.S. at 121. And there is no indication that Rule 606(b)'s drafters intended to broaden the common-law rule to bar the admission of testimony tending to show juror dishonesty during voir dire. To the contrary, the drafters appear to have assumed that Rule 606(b), like its common-law predecessor, would bar only the use of juror testimony to challenge how the verdict was reached.

There is no valid support in the drafting history or subsequent interpretation of Rule 606(b) for the proposition that Rule 606(b) displaced the common-law principle, reflected in *Clark*, allowing testimony from jury deliberations in an inquiry into dishonesty during voir dire. Indeed, *Tanner*—this Court's only decision to date on the scope of Rule 606(b)—reaffirmed *Clark*'s key holding: namely, that voir dire is a safeguard of a fair trial that exists separate and apart from rules shielding jury deliberations. And all of this merely confirms what the language of Rule 606(b) already makes plain: juror testimony about dishonesty during voir dire is admissible.

1. The Drafters Of Rule 606(b) Did Not Intend To Prohibit Juror Testimony About Dishonesty During Voir Dire

Enacted in 1975 along with the rest of the Federal Rules of Evidence, Rule 606(b) was drafted against the backdrop of *Clark* and other decisions permitting the in-

troduction of juror testimony to prove dishonesty during voir dire. Yet nothing in the drafting history of Rule 606(b) suggests that the drafters intended to depart from that preexisting rule and bar the admission of such testimony. Instead, the drafting history suggests that the drafters took as a given that their rule would sweep no further than to prohibit the use of juror testimony to challenge how the verdict was reached, and differed only as to whether testimony that the verdict was reached in certain improper ways—such as the use of a quotient verdict, juror intoxication, or a refusal to deliberate—should be admissible.

As initially drafted by the Judicial Conference's Rules Committee, Rule 606(b) did not restrict testimony concerning "statement[s] made" or "incident[s] that occurred" during deliberations. Instead, the draft rule focused narrowly on restricting jurors from testifying about their mental states in reaching the verdict:

> Upon an inquiry into the validity of a verdict or indictment, a juror may not testify concerning the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith. Nor may his affidavit or evidence of any statement by him indicating an effect of this kind be received for these purposes.

Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Preliminary Draft of Proposed Rules of Evidence for the United States District Courts and Magistrates (Mar. 1969).

After this Court circulated the draft rule, numerous parties raised objections to what they perceived as the rule's unduly permissive scope. Attorney General Klein-

dienst, for example, expressed the view that the draft rule introduced the "danger of harassment of jurors by unsuccessful litigants," and argued for a more restrictive version that "adhere[d] to the rule that jurors cannot testify about irregularities in their deliberations." 117 Cong. Rec. 33,655 (1971). And Senator McClellan warned against permitting testimony concerning "conduct in the jury room," approvingly citing cases in which evidence of compromise or quotient verdicts had been excluded. *Id.* at 33,645. In his view, "[j]udges need not explain their verdicts beyond the judgment and the opinion," and "[p]resent law * * * wisely prohibits this sort of inquiry before it starts with jurors." *Ibid.*

When the Court circulated a revised draft of the rules in 1973, it took account of those objections. In language similar to what was ultimately enacted, the revised draft rule provided as follows:

> Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror.

Communication from the Chief Justice of the United States Transmitting the Proposed Rules of Evidence, H.R. Doc. No. 93-46, at 20 (1973). Notably, the advisory committee's note explained that the "central focus" of the revised draft rule was "insulation of *the manner in*

which the jury reached its verdict," including not just "mental and emotional reactions" but "each of the [other] components of deliberation." Fed. R. Evid. 606 advisory committee's note (1972 proposed rules) (emphasis added).

In their committee reports on the proposed rules, the House and the Senate expressed preferences for different versions of Rule 606(b). The House Judiciary Committee supported the earlier version, expressing concern that the later version would prevent parties from exposing misconduct such as the use of a "quotient verdict" or the "drunken condition of a fellow juror." H.R. Rep. No. 650, 93rd Cong., 1st Sess. 9-10 (1973). But the Senate Judiciary Committee supported the later version, noting its disapproval of the earlier version on the ground that "[p]ermitting an individual to attack a jury verdict based upon the jury's internal deliberations has long been recognized as unwise by the Supreme Court." S. Rep. No. 1277, 93rd Cong., 2d Sess. 13-14 (1974). For that view, the Senate Judiciary Committee cited this Court's decision in *McDonald* and the familiar policy considerations supporting the common-law rule. *Ibid.* Ultimately, the Senate's view prevailed at conference, H.R. Rep. No. 1597, 93rd Cong., 2d Sess. 8 (1974) (Conf. Rep.), and the revised draft rule was enacted in materially identical form.[4]

---

[4] Rule 606(b) has been substantively amended once since its enactment. In 2006, this Court added a third exception to the prohibition on juror testimony during an inquiry into the validity of the verdict, permitting testimony regarding whether there was "a mistake in entering the verdict onto the verdict form." Communication from the Chief Justice of the United States Transmitting Amendments to the Federal Rules of Evidence, H.R. Doc. No. 109-108, at 5 (2006). That amendment also restyled the three exceptions, listing

Conspicuously absent from the debate leading up to the adoption of Rule 606(b) is any suggestion that the rule altered either the common-law rule's general focus on matters that "inhere in the verdict itself," *Hyde*, 225 U.S. at 384, or the specific rule, articulated in *Clark*, which permitted juror testimony during an inquiry into voir dire dishonesty. If anything, by limiting the rule to juror testimony offered "[d]uring an inquiry into the validity of a verdict," the drafters of Rule 606(b) implicitly ratified those aspects of the common-law rule.

At the very least, the drafters did not abrogate the common-law principle allowing juror testimony about dishonesty during voir dire. As this Court has repeatedly emphasized, "[i]n order to abrogate a common-law principle," a statute or rule must "'speak directly' to the question addressed by the common law." *United States* v. *Texas*, 507 U.S. 529, 534 (1993) (citations omitted); see *Tome* v. *United States*, 513 U.S. 150, 161 (1995). Rule 606(b), of course, says nothing about juror testimony concerning dishonesty during voir dire. And in the debates surrounding its enactment, its drafters never so much as mentioned either the rule of *Clark* or voir dire more generally. Plainly, then, Rule 606(b) did not "abrogate [the] common-law principle" in *Clark*, for the simple reason that its drafters did not "speak directly"—or, for that matter, at all—"to the question addressed by the common law." *Texas*, 507 U.S. at 534 (citation omitted).

In short, nothing in the debate surrounding the adoption of Rule 606(b) even hints that the rule could be stretched as far as the court of appeals did here: *viz.*, to

---

them as enumerated subparts. *Ibid.* In addition, nonsubstantive amendments were made in 1975, 1987, and 2011.

abrogate the preexisting common-law rule and bar the introduction of juror testimony not to impeach the verdict, but to prove juror dishonesty during voir dire. Because there is no indication anywhere in the drafting history—much less in the text of the rule—to support the court of appeals' expansive interpretation, this Court should reject it and hold that an inquiry into juror dishonesty during voir dire does not trigger the application of Rule 606(b).

2. *This Court's Decision In* Tanner *Further Confirms That Rule 606(b) Does Not Exclude Juror Testimony About Dishonesty During Voir Dire*

This Court's decision in *Tanner* provides further support for the conclusion that juror testimony about dishonesty during voir dire is admissible under Rule 606(b).

a. In *Tanner*, the Court considered the application of Rule 606(b) to juror testimony about the intoxication of certain jurors during trial. 483 U.S. at 112-113, 115-116. The defendants in *Tanner* were seeking to introduce that testimony to demonstrate that the verdict itself was tainted; as such, they did not dispute that they were seeking to "inquir[e] into the validity of [the] verdict." *Id.* at 121. Instead, the defendants in *Tanner* primarily argued that the testimony was nevertheless admissible under the exception now contained in Rule 606(b)(2)(B), which permits juror testimony about whether "an outside influence was improperly brought to bear on any juror." *Id.* at 122. The Court rejected that argument, holding that "drugs or alcohol voluntarily ingested by a juror seems no more an 'outside influence' than a virus, poorly prepared food, or a lack of sleep." *Ibid.* That outcome was unsurprising, because, as discussed above, Rule 606(b)'s drafters expressly rejected a narrower rule which would have permitted juror testi-

mony regarding "the drunken condition of a fellow juror." H.R. Rep. No. 650, *supra*, at 9-10. Indeed, quoting that rejected proposal, the Court noted that "whatever ambiguity might linger in the language of Rule 606(b) as applied to juror intoxication is resolved by the legislative history of the Rule." 483 U.S. at 122.

Of particular note here, the Court also rejected the defendants' alternative argument: namely, that the refusal to admit (or inquire into) juror testimony about intoxication "violate[d] the [S]ixth [A]mendment's guarantee to a fair trial before an impartial and *competent* jury." 483 U.S. at 126 (citation omitted). In holding that the testimony was inadmissible under Rule 606(b), the Court reasoned that the defendants' "interests in an unimpaired jury * * * [were] protected by several aspects of the trial process." *Id.* at 127. Chief among those, the Court explained, was voir dire, during which "[t]he suitability of an individual for the responsibility of jury service * * * is examined." *Ibid.* Because "th[o]se other sources of protection of [the defendants'] right to a competent jury" were not infringed, the Court held that the district court had not erred by refusing to admit the juror testimony under Rule 606(b). *Ibid.* Mirroring *Clark*'s treatment of the common-law rule, *Tanner* thus confirmed that Rule 606(b) and voir dire protect entirely different interests.

b. In refusing to "create an exception" for juror testimony about statements that tend to show juror dishonesty during voir dire, the court of appeals in this case relied on *Tanner*'s recitation of the policy considerations supporting exclusion of juror testimony about deliberations more generally: specifically, the concern that admitting such evidence would chill "full and frank discussion in the jury room." Pet. App. 10a (quoting *Tanner*, 483 U.S. at 120-121). But the court of appeals was not

being asked to "create an exception" at all. At least since *Clark*, juror testimony has been admissible to prove that a juror lied during voir dire. And the Court reached that holding in *Clark* notwithstanding the very same policy considerations about stifling "[f]reedom of debate" and "independence of thought." 289 U.S. at 13.

Neither the enactment of Rule 606(b) nor *Tanner* altered the rule articulated in *Clark*. Indeed, in *Tanner*, the Court recognized that voir dire promotes the underlying right to an impartial and competent jury—thus implicitly reaffirming *Clark*'s conclusion that policy considerations shielding jury deliberations are at a nadir during an inquiry into juror dishonesty during voir dire. See *Tanner*, 483 U.S. at 127. The court of appeals erred by invoking *Tanner* to bar the admission of Mr. Titus's affidavit, and its expansive interpretation of the exclusionary scope of Rule 606(b) cannot readily be reconciled either with *Clark* or with *Tanner* itself.

D. The Canon Of Constitutional Avoidance Requires Interpreting Rule 606(b) To Permit Juror Testimony About Dishonesty During Voir Dire

To the extent there is any lingering doubt about whether Rule 606(b) permits the introduction of juror testimony about deliberations in order to show juror dishonesty during voir dire, that doubt is extinguished by the canon of constitutional avoidance. Even it were plausible to characterize an inquiry into juror dishonesty during voir dire as an "inquiry into the validity of [the] verdict" for purposes of Rule 606(b)(1), this Court should avoid that interpretation because it "would, at least, raise * * * grave and doubtful constitutional question[s]." *Missouri Pacific R.R.* v. *Boone*, 270 U.S. 466, 471-472 (1926).

1. As discussed above, it is beyond dispute that the Constitution guarantees a right to an impartial jury in criminal and civil cases alike. See p. 16, *supra*. That right inheres both in the specific constitutional amendments providing for a right to a jury trial and in the broader constitutional right to due process. See *ibid.*

Because voir dire plays a "critical" role in safeguarding the constitutional right to an impartial jury, *Rosales-Lopez*, 451 U.S. at 188, this Court has held that voir dire itself can be constitutionally insufficient if it is improperly conducted. That is an unremarkable proposition, because voir dire can protect the underlying right to an impartial jury only if the questions are sufficient to expose the biases of prospective jurors. Thus, the Court has held that, where a court prohibits effective voir dire questioning—for example, by refusing to allow questioning about racial bias in certain circumstances—such a prohibition violates both the specific Sixth Amendment jury-trial right and the broader constitutional right to due process. See *Turner* v. *Murray*, 476 U.S. 28, 36 n.9 (1986); *Ham* v. *South Carolina*, 409 U.S. 524, 527 (1973).

By the same token, voir dire can be constitutionally sufficient only if prospective jurors provide truthful answers. Just as a court's failure to allow certain questions undermines the efficacy of voir dire, so too does a prospective juror's refusal to answer those questions honestly. This Court recognized as much in *McDonough* when it explained that, for voir dire to function properly, "[t]he necessity of truthful answers by prospective jurors * * * is obvious." 464 U.S. at 554. From a litigant's perspective, moreover, it does not matter whether voir dire was corrupted by improper questions or by dishonest answers; in either instance, the end result is a violation of the litigant's constitutional right to an impartial jury.

2. The foregoing constitutional concerns are only heightened in an "especially odious"—and sadly too common—category of cases involving juror dishonesty during voir dire: cases of dishonesty involving racial bias, often arising in the criminal context. *United States* v. *Benally*, 546 F.3d 1230, 1241 (10th Cir. 2008), cert. denied, 558 U.S. 1051 (2009). The problem of racial bias is especially difficult to root out during voir dire, for the obvious reason that racially prejudiced jurors are not always willing to admit their bias in open court. *United States* v. *Villar*, 586 F.3d 76, 87 & n.5 (1st Cir. 2009). Yet racial bias will frequently come to light in the heat of deliberations behind closed doors in the jury room. Statements made during deliberations—such as, "[l]et's be logical[;] he's a black, and he sees a seventeen year old white girl—I know the type," *Shillcutt* v. *Gagnon*, 827 F.2d 1155, 1159 (7th Cir. 1987), or, "I guess we're profiling but [Hispanics] cause all the trouble," *Villar*, 586 F.3d at 78—will often be the only evidence that a juror lied about racial bias during voir dire. If such evidence is not admissible to support a *McDonough* claim, however, parties will be unable to remedy denial of their fundamental "right to an impartial jury that can view [them] without racial animus," *Georgia* v. *McCollum*, 505 U.S. 42, 58 (1992)—a right that implicates not only the constitutional provisions guaranteeing an impartial jury, but also the Fifth and Fourteenth Amendment's provisions guaranteeing equal protection under the law.

To be sure, this case does not involve racial bias. But the Court has made clear that the canon of constitutional avoidance requires rejecting an interpretation that "would raise a multitude of constitutional problems," regardless of "whether or not those constitutional problems pertain to the particular litigant before the Court." *Clark* v. *Martinez*, 543 U.S. 371, 380-381 (2005). In any

event, the broader constitutional concerns with barring evidence of juror dishonesty during voir dire confirm that this Court should reject the court of appeals' already atextual and ahistorical interpretation of Rule 606(b)(1).

E. Permitting Juror Testimony To Prove Dishonesty During Voir Dire Would Not Contravene Any Of The Policy Considerations Behind Rule 606(b)

As discussed above, three familiar policy interests support limiting inquiry into jury deliberations more generally: encouraging "full and frank discussion in the jury room," prohibiting "harass[ment]" of jurors by the losing party, and promoting "finality of the process." *Tanner*, 483 U.S. at 120-121; see p. 24, *supra*. Permitting juror testimony about deliberations for the limited purpose of proving dishonesty during voir dire, however, would not disserve any of those interests.

1. As an initial matter, admitting juror testimony about deliberations in support of a *McDonough* claim would not discourage "full and frank discussion in the jury room." *Tanner*, 483 U.S. at 120. Jurors do not have an unqualified expectation that their deliberations will remain private. Juror testimony about deliberations is ordinarily *admissible*, except for the purpose of "inquir[ing] into the validity of a verdict or indictment." Fed. R. Evid. 606(b)(1). And even then, the prohibition is subject to a number of exceptions. Fed. R. Evid. 606(b)(2).

More fundamentally, nothing in Rule 606(b) or any other source of law prevents jurors from speaking about deliberations in the aftermath of a verdict. Indeed, especially in high-profile cases, jurors routinely grant interviews to journalists in which they candidly discuss the deliberative process. See Nancy S. Marder, *Deliberations and Disclosures: A Study of Post-Verdict Interviews of Jurors*, 82 Iowa L. Rev. 465, 477-489 (1997).

The jury room is thus far from a black box, and it would be unreasonable for any juror to believe otherwise.

Beyond the general principle that juror testimony is ordinarily admissible, juror statements that tend to show dishonesty during voir dire are already subject to disclosure. As the court of appeals recognized in this case, at least since the Court's decision in *Clark*, juror testimony about deliberations has been admissible to show dishonesty during voir dire in the context of contempt proceedings against the allegedly dishonest juror. See Pet. App. 8a. Perhaps the admissibility of such testimony already has a chilling effect on jury deliberations; perhaps it does not. But it is impossible to see how there would be an *additional* chilling effect from the admission of such testimony in support of a *McDonough* claim. It would be the odd juror indeed whose speech is not chilled by the threat of criminal contempt, but is chilled by the possibility that a party to the case may receive a new trial.

It seems particularly unlikely that permitting juror testimony to prove dishonesty during voir dire would have a chilling effect, because a juror who makes statements that tend to show dishonesty during voir dire is already running the risk that such statements will be disclosed to the judge before the verdict. Courts have held that a juror may disclose evidence of another juror's misconduct to the judge in the course of deliberations. See, *e.g.*, *Ebron*, 683 F.3d at 125-126; *United States* v. *Boone*, 458 F.3d 321, 329 (3d Cir. 2006). If Mr. Titus had reported Ms. Whipple's statements to the judge while deliberations were ongoing, the judge could have investigated Ms. Whipple for misconduct and even removed her from the jury. Yet neither that threat, nor the threat of being held in contempt after the fact, deterred Ms. Whipple from speaking openly. The notion that the mere possibility of a subsequent *McDonough* claim

would have had a deterrent effect on Ms. Whipple, and would have that effect on similarly situated jurors, is therefore fanciful.

2. Equally fanciful is the notion that jurors will be "harassed and beset by the defeated party" in an attempt to obtain testimony that could support a *McDonough* claim. *McDonald*, 238 U.S. at 267. To begin with, there is no evidence that such harassment is a more acute problem in those jurisdictions on petitioner's side of the circuit conflict—including the Ninth Circuit, the Nation's largest, which has permitted the introduction of juror testimony to prove dishonesty during voir dire for almost three decades. See *Hard* v. *Burlington Northern R.R.*, 812 F.2d 482, 485 (9th Cir. 1987). The rules of evidence in many States, moreover, permit the introduction of such testimony, and there is no evidence that such harassment has been a more substantial problem in those jurisdictions, either. See, *e.g.*, Cal. Evid. Code § 1150(a); Fla. Stat. Ann. § 90.607(2)(b); Haw. Rev. Stat. § 626-1, R. 606(b); Kan. Stat. Ann. §§ 60-441, 60-444; Nev. Rev. Stat. § 50.065(2)(a). And there is no reason to believe that such harassment is a widespread problem more generally, even though juror testimony about deliberations is admissible in a range of other contexts. See p. 40, *supra*.

In any event, any specter of "harassment" under a rule that permitted the introduction of juror testimony about deliberations to prove dishonesty during voir dire would be neutralized by court rules that limit post-verdict contact by parties with jurors. In the federal system, some local rules, like South Dakota's, prohibit contact with jurors until they have completed their term of service. See, *e.g.*, D.S.D. R. 47.2. Other rules require parties to obtain the permission of the judge before communicating with jurors. See, *e.g.*, M.D. Fla. R. 9015-

1(c); C.D. Ill. R. 47.2(2); N.D. Ill. R. Crim. P. 3.1; S.D. Ill. R. 53.1; S.D. Ohio R. 47.1; N.D. Tex. R. 47.1. Still others require judicial permission *and* a showing of good cause. See, *e.g.*, S.D. Fla. R. 11.1(e); W.D.N.C. R. Civ. P. 47.1 (D); E.D. Va. R. Civ. P. 47(C); W.D. Va. R. 10. Still others directly prohibit juror "harassment." See, *e.g.*, E.D. N.C. R. Civ. P. 47.1(c); M.D.N.C. R. 47.1(b)(4). And in those jurisdictions that do not maintain one of these types of standing restrictions on post-verdict contact, judges retain the discretion to impose restrictions in individual cases as necessary. See, *e.g.*, C.D. Cal. R. 83-3.1, 83-3.2.7.

Counsel for a losing party, moreover, are subject to an additional layer of restriction in the form of state ethical rules, which generally prohibit counsel from engaging in any form of juror harassment. The ethical rules in most States are patterned after the Model Rules of Professional Conduct, which prohibit a lawyer from communicating with a juror after the verdict if "the juror has made known to the lawyer a desire not to communicate" or "the communication involves misrepresentation, coercion, duress or harassment." Model Rules of Prof'l Conduct R. 3.5(c). Some States have simply incorporated those restrictions verbatim. See, *e.g.*, S.D. Rules of Prof'l Conduct R. 3.5(c); Ill. Rules of Prof'l Conduct R. 3.5(c); N.C. Rules of Prof'l Conduct R. 3.5(a)(5); Ohio Rules of Prof'l Conduct R. 3.5(a)(4); Pa. Rules of Prof'l Conduct R. 3.5(c). Other States have imposed additional restrictions geared toward preventing lawyers from engaging in more indirect harassment by investigating jurors. See, *e.g.*, Cal. Rules of Prof'l Conduct R. 5-320(E); N.Y. Rules of Prof'l Conduct R. 3.5(a)(6); Va. Rules of Prof'l Conduct R. 3.5(a)(3).

In light of all those restrictions on post-verdict juror contact, there is little reason to think that jurors would

suddenly be exposed to harassment if this Court were to hold that juror testimony is admissible in support of a *McDonough* claim. In fact, given those restrictions, it is unlikely that parties or their counsel would seek to contact jurors at all. It is far more likely that evidence of juror misconduct would come to light when a concerned juror contacts counsel—as happened in this case, as well as many other cases involving juror misconduct. See, *e.g.*, *Tanner*, 483 U.S. at 113; *Villar*, 586 F.3d at 78.

Indeed, this case reflects what is perhaps the antithesis of harassment. Bound by South Dakota's local rule prohibiting juror contact until jurors have completed their term of service, petitioner's counsel *refused* to speak with Mr. Titus until they had obtained permission from the judge. Given the ubiquity of rules restricting juror contact, it seems likely that future cases will unfold in much the same manner. Because the risk of harassment by parties or their counsel seeking to support a *McDonough* claim is at best remote, that policy interest also does not support the court of appeals' interpretation.

3. As to the policy interest in preserving the finality of the judicial process, the key point is that the mere admission of evidence that tends to show juror dishonesty during voir dire would not automatically entitle a party to a new trial under *McDonough*. Once the evidence is admitted, a *McDonough* motion would still be denied if a court determines that the juror's response to a voir dire question was not dishonest at the time it was made. See, *e.g.*, *United States* v. *Brooks*, 727 F.3d 1291, 1308 (10th Cir.), cert. denied, 134 S. Ct. 835 (2013). It would also be denied if a court determines that the juror was dishonest only in response to a "non-material" question. See, *e.g.*, *Coughlin* v. *Tailhook Association*, 112 F.3d 1052, 1061 (9th Cir. 1997). And it would also be denied if

a court determines that an honest answer to a material question would not have provided a valid basis for a challenge for cause. See, *e.g.*, *United States* v. *Fulks*, 454 F.3d 410, 432 (4th Cir. 2006), cert. denied, 551 U.S. 1147 (2007). For those reasons, *McDonough*'s requirements have proven to be stringent in application. And a ruling in petitioner's favor on the *evidentiary* question presented here would have no effect on the lower courts' application of *McDonough*'s *substantive* requirements.

Nor would a ruling that juror testimony is admissible in support of a *McDonough* claim dictate the conclusion that a court should automatically *credit* that testimony. After reviewing the proffered testimony, a court could reject it as not credible. Alternatively, a court could order an evidentiary hearing to assess the credibility of the testimony (or to take testimony from the allegedly dishonest juror). That is all the more reason why merely admitting juror testimony in support of a *McDonough* claim would not undermine the "finality of the process" in any meaningful sense. *Tanner*, 483 U.S. at 120.

In sum, there is no valid policy justification to counteract the conclusion that the text and history of Rule 606(b)(1) compel. Because an inquiry into juror dishonesty during voir dire does not constitute an "inquiry into the validity of [the] verdict," the court of appeals erred by holding that juror testimony about statements made during deliberations that tend to show juror dishonesty during voir dire is inadmissible under Rule 606(b)(1).

II. IN THE ALTERNATIVE, JUROR TESTIMONY ABOUT STATEMENTS MADE DURING DELIBERATIONS THAT TEND TO SHOW DISHONESTY DURING VOIR DIRE IS ADMISSIBLE UNDER FEDERAL RULE OF EVIDENCE 606(B)(2)(A)

For the reasons stated above, there is an overwhelming case, based on the text and history of the rule, for

holding that evidence that tends to show juror dishonesty during voir dire is admissible under Rule 606(b)(1). Should this Court disagree, however, it should hold that such evidence is admissible under Rule 606(b)(2)(A), which creates an exception to Rule 606(b)(1) for evidence that "extraneous prejudicial information was improperly brought to the jury's attention." See *United States* v. *Boney*, 68 F.3d 497, 503 (D.C. Cir. 1995). Because statements made during deliberations that tend to show juror dishonesty during voir dire qualify as "extraneous prejudicial information" within the meaning of the rule, the court of appeals erred by holding that the affidavit at issue here was inadmissible under Rule 606(b)(2)(A).

A. To begin with, when a juror makes statements during deliberations about the very information that, if disclosed, would have disqualified the juror from jury service, that information is "extraneous" to the jury. In this regard, the facts of the District of Columbia Circuit's decision in *Boney* are instructive. There, defense counsel learned after a criminal trial that the jury foreperson had previously been convicted of a felony—a fact that, if disclosed, would have disqualified him from serving on the jury. 68 F.3d at 499. On the defendant's motion for a new trial, the trial judge refused to ask the foreperson any questions about his statements to the other jurors during deliberations, on the ground that such questions were barred by Rule 606(b). *Id.* at 500. But the D.C. Circuit reversed. *Id.* at 503. It noted that the foreperson's status as a felon, if disclosed, would have disqualified him from serving on the jury—and, on that basis, concluded that "any discussion of [his] felon status during deliberations would surely seem to be 'extraneous.'" *Ibid.*

So too here. If Ms. Whipple had disclosed that her own daughter had been at fault in a fatal automobile ac-

cident—and that, as a result, she was unwilling to award damages to the victim of a traffic accident—she would surely have been struck for cause. As a result, the experiences of Ms. Whipple's daughter (and Ms. Whipple's resulting views) "should not have been before the jury at all," *Boney*, 68 F.3d at 503, and thus constituted "extraneous" information for purposes of Rule 606(b)(2)(A).

B. Where a juror makes statements during deliberations about information that would have disqualified the juror from jury service, that information is also "prejudicial," because the information would likely prejudice other jurors for precisely the same reason that it would have led to disqualification. Again, this case proves the point. Ms. Whipple's statements during deliberations went to the heart of the case: *i.e.*, whether the jury should hold respondent liable, and award damages to petitioner, for the traffic accident in which petitioner lost his leg. And Mr. Titus's affidavit raised more than just a theoretical concern that Ms. Whipple's statements could have prejudiced petitioner; Mr. Titus expressed the belief that those statements actually did influence other jurors. See Pet. App. 41. There can therefore be no serious doubt that Ms. Whipple's statements constituted "prejudicial" information within the meaning of Rule 606(b)(2)(A).

C. Finally, where a juror makes statements during deliberations about information that would have disqualified the juror from jury service, that information was "improperly brought to the jury's attention." It bears repeating that a juror who obtains a seat on the jury only through dishonesty during voir dire should never have been on the jury in the first place, and thus has no right to participate in deliberations at all. As this Court explained in *Clark*, such a juror is a juror "in name only," because the juror's presence on the jury is "a sham and a

pretense." 289 U.S. at 11, 14. Just as information that, if disclosed, would have disqualified the juror from jury service is "extraneous" to the jury, such information was "improperly brought to the jury's attention" as well.

Of course, the Court need not address the applicability of the exception in Rule 606(b)(2)(A) if it concludes that Rule 606(b)(1) was not triggered in the first place. And because an inquiry into juror dishonesty during voir dire does not constitute an "inquiry into the validity of [the] verdict," Rule 606(b)(1) does not prohibit juror testimony about statements made during deliberations that tend to show such dishonesty. The court of appeals erred by adopting the contrary interpretation. This Court should reverse the court of appeals' judgment and remand so that the district court can reconsider petitioner's *McDonough* claim in light of the improperly excluded evidence.

CONCLUSION

The judgment of the court of appeals should be reversed, and the case remanded for further proceedings.

Respectfully submitted.

STEVEN C. BEARDSLEY
GARY D. JENSEN
BEARDSLEY, JENSEN
& VON WALD, P.L.L.C.
4200 Beach Drive, Suite 3
P.O. Box 9579
Rapid City, SD 57709

KANNON K. SHANMUGAM
JAMES M. MCDONALD
ELI SAVIT
LESLIE COOPER MAHAFFEY
WILLIAMS & CONNOLLY LLP
725 Twelfth Street, N.W.
Washington, DC 20005
(202) 434-5000
kshanmugam@wc.com

MAY 2014

RESPONDENT'S BRIEF

No. 13-517

IN THE

Supreme Court of the United States

GREGORY P. WARGER,

Petitioner,

v.

RANDY D. SHAUERS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENT

RONALD R. KAPPELMAN
GREGORY G. STROMMEN
CASSIDY M. STALLEY
BANKS, JOHNSON, KAPPELMAN & BECKER, PLLC
P.O. Box 9007
Rapid City, SD 57709
(605) 341-2400

SHEILA L. BIRNBAUM
Counsel of Record
DOUGLAS W. DUNHAM
ELLEN P. QUACKENBOS
LAURENTIA C. MCKESSAR
QUINN EMANUEL URQUHART & SULLIVAN, LLP
51 Madison Ave., 22nd Flr.
New York, NY 10010
(212) 849-7000
sheilabirnbaum@quinnemanuel.com

Counsel for Respondent

August 6, 2014

254894

QUESTION PRESENTED

Whether Federal Rule of Evidence 606(b)'s prohibition on juror testimony "during an inquiry into the validity of a verdict" about "any statement made or incident that occurred during the jury's deliberations" precludes a party from presenting juror testimony about jury deliberations to prove that a juror was dishonest during *voir dire*, when the party seeks to use that showing in support of a motion to vacate the verdict and for a new trial.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES v

STATEMENT 1

A. The Accident 1

B. District Court Proceedings 3

1. Jury Selection and *Voir Dire* 3

2. Final Jury Instructions 6

3. Petitioner's Post-Trial Motion and Juror Titus's Affidavit 7

C. The District Court's Decision 9

D. The Eighth Circuit's Decision 10

SUMMARY OF ARGUMENT 11

ARGUMENT 17

I. THE PLAIN LANGUAGE OF RULE 606(b) PRECLUDES EVIDENCE OF JUROR WHIPPLE'S STATEMENTS DURING DELIBERATIONS TO INVALIDATE THE VERDICT 17

A. Juror Titus's Affidavit Falls Squarely Within the Prohibition of Rule 606(b) 17

B. Rule 606(b)(2)(A)'s Exception for "Extraneous Prejudicial Information" Does Not Apply in This Case 25

1. A Juror's Personal Experiences and Biases Are Not Extraneous Prejudicial Information 25

2. *United States v. Boney* Does Not Support Application of the Rule 606(b)(2)(A) Exception in This Case 29

II. THE LEGISLATIVE HISTORY OF RULE 606(b) AND THE RULE'S COMMON LAW PREDECESSORS SUPPORT THE EXCLUSION OF JUROR TITUS'S AFFIDAVIT 31

III. THE POLICY CONCERNS IDENTIFIED BY THIS COURT IN *TANNER* SUPPORT THE EXCLUSION OF JUROR TESTIMONY REGARDING DELIBERATIONS IN CHALLENGES TO A VERDICT BASED ON ALLEGED DISHONESTY IN *VOIR DIRE* 39

IV. THE PRINCIPLE OF CONSTITUTIONAL AVOIDANCE DOES NOT REQUIRE OR SUPPORT HOLDING THAT JUROR STATEMENTS MADE DURING DELIBERATIONS CAN BE USED TO CHALLENGE A JUROR'S HONESTY ON *VOIR DIRE* 46

V. PETITIONER HAS NOT SATISFIED THE *MCDONOUGH* REQUIREMENTS FOR A NEW TRIAL BASED UPON JUROR DISHONESTY DURING *VOIR DIRE* 49

A. Petitioner Has Not Shown That Juror Whipple Answered Any Question Dishonestly 50

B. Petitioner Has Not Met the Second *McDonough* Requirement 56

CONCLUSION 58

TABLE OF AUTHORITIES

Page(s)

Cases

BankAtlantic v. Blythe Eastman Paine Webber, Inc.,
955 F.2d 1467 (11th Cir. 1992).....56

Beck v. Alabama,
447 U.S. 625 (1980).....28

Braley v. Shillinger,
902 F.2d 20 (10th Cir. 1990).....49

Bulger v. McClay,
575 F.2d 407 (2d Cir. 1978) 28-29

Clark v. Martinez,
543 U.S. 371 (2005)..... 46-47

Clark v. United States,
289 U.S. 1 (1933).....14, 36, 37, 41

Connecticut National Bank v. Germain,
503 U.S. 249 (1992).....47

Crawford v. United States,
212 U.S. 183 (1909).....55

Daubert v. Merrell Dow Pharmaceuticals, Inc.,
509 U.S. 579 (1993).....38

Fields v. Brown,
503 F.3d 755 (9th Cir. 2007).....53, 54

Gardner v. Ozmint,
511 F.3d 420 (4th Cir. 2007).....53

Government of the Virgin Islands v. Gereau,
523 F.2d 140 (3d Cir. 1975) 26

Ham v. South Carolina,
409 U.S. 524 (1973) 54

Hard v. Burlington Northern Railroad,
812 F.2d 482 (9th Cir. 1987).....20

J.E.B. v. Alabama ex rel. T.B.,
511 U.S. 127 (1994).....28

Johnson v. Hunter,
144 F.2d 565 (10th Cir. 1944).....49

Marcavage v. Board Of Trustees of Temple University,
400 F Supp. 2d 801 (E.D. Pa. 2005) 27

Mattox v. United States,
146 U.S. 140 (1892).....26

McDonald v. Pless,
238 U.S. 264 (1915).....26, 34, 37, 40-41, 44

McDonough Power Equipment, Inc. v. Greenwood,
464 U.S. 548 (1984)..... 13, 16-17, 21-22
.....45, 49, 50, 53, 55-58

Rosales-Lopez v. United States,
451 U.S. 182 (1981).....47, 54

Sebelius v. Cloer,
133 S. Ct. 1886 (2013).....39, 47

Shillcutt v. Gagnon,
827 F.2d 1155 (7th Cir. 1987).....28

Smith v. Phillips,
455 U.S. 209 (1982).....56

State v. Finney,
337 N.W.2d 167 (S.D. 1983) 34

Tanner v. United States,
483 U.S. 107 (1987) 10-11, 15, 32-34
..... 39-40, 41, 43-46, 48-49

Titus v. State,
963 P.2d 258 (Alaska 1998) 27

Turner v. Murray,
476 U.S. 28 (1986) 54

United States v. Benally,
546 F.3d 1230 (10th Cir. 2008),
cert. denied, 558 U.S. 1051 (2009) 12-14, 20, 24,
..... 37, 39, 42, 45, 48-49

United States v. Boney,
68 F.3d 497 (D.C. Cir. 1995) 29-31, 55

United States v. Brooks,
727 F.3d 1291 (10th Cir.),
cert. denied, 134 S. Ct. 835 (2013) 50, 53

United States v. Campbell,
684 F.2d 141 (D.C. Cir. 1982) 26

United States v. Cornelius,
696 F.3d 1307 (10th Cir. 2012) 27

United States v. Duzac,
622 F.2d 911 (5th Cir. 1980) 26-27

United States v. Estey,
595 F.3d 836 (8th Cir. 2010) 53-54

United States v. Henley,
238 F.3d 1111 (9th Cir. 2001) 20

United States v. Kerr,
778 F.2d 690 (11th Cir. 1985) 50

United States v. McKinney,
429 F.2d 1019 (5th Cir.), *modified on reh'g on other grounds*, 434 F.2d 831 (5th Cir. 1970).....28

United States v. Tutt,
704 F.2d 1567 (11th Cir. 1983).....56

United States v. Wilson,
534 F.2d 375 (D.C. Cir. 1976).....26

United States v. Valencia-Trujillo,
380 F. App'x 936 (2010) 56

Williams v. Price,
343 F.3d 223 (3d Cir. 2003) .....12, 13, 15, 16, 20 ..... 21-23, 26, 41, 48-49

Statutes and Regulations

Fed. R. Evid. 606(b).....*passim*

Fed. R. Evid. 606(b)(1) ..... 12, 17-19, 21 ..... 34-35, 38, 46-47

Fed. R. Evid. 606(b)(2) 25

Fed. R. Evid. 606(b)(2)(A) 11, 14, 25, 29, 31

Miscellaneous

3 J. Weinstein & M. Berger, *Weinstein's Federal Evidence*, §606.04 (1997) 45

8 J.H. Wigmore, *Wigmore on Evidence* §2346 (McNaughton ed. 1961).....43

27 Charles Wright & Victor Gold, *Federal Practice and Procedure* §6075 (1990) 27

27 Charles Wright & Victor Gold,
Federal Practice & Procedure §6071 (2007).....45

56 F.R.D. 183 (1972) 34-36

120 Cong. Rec. H551
(daily ed. Feb. 6, 1974)..... 32-33, 45

Advisory Committee Notes on Rules
of Evidence,
46 F.R.D. 161 (1969) 32-33

Hearings Before the Committee on the
Judiciary on Federal Rules of Evidence,
H.R. 5463, 93d Cong., 2d Sess. (1974) 33, 34

S. Rep. No. 93-1277 (1974), *reprinted in* 1974
U.S.C.C.A.N. 7051 .....15, 33-34, 40, 44

STATEMENT

This case arises from the trial of Petitioner Gregory Warger's negligence claims against Respondent Randy Shauers after an accident between Petitioner, riding a motorcycle, and Respondent and his family in their pickup truck and travel trailer. At the trial, shortly after seeking clarification from the district court of its instruction on contributory negligence, the jury returned a unanimous verdict for Respondent. Petitioner moved, *inter alia*, to set aside the verdict and for a new trial, on the ground that one of the jurors, Regina Whipple, had been dishonest in failing to disclose at *voir dire* that her daughter had been at fault in a fatal car accident – a circumstance that Petitioner claims biased the juror, and perhaps influenced other jurors, against him. As the sole support for his motion, Petitioner sought to introduce an affidavit by a second juror regarding statements allegedly made by Ms. Whipple during deliberations. The district court excluded the affidavit under Federal Rule of Evidence 606(b) and denied Petitioner's motion. (Pet.App.28a-39a.) The Eighth Circuit unanimously affirmed, holding that "Rule 606(b) precludes jurors from testifying in regards to jury deliberations for the purpose of challenging a verdict." (Pet.App.10a.)

A. The Accident

In the summer of 2006, Respondent, along with his wife and two children, traveled to South Dakota from Utah for a family camping vacation. On August 4, 2006, they packed their pickup and 28-foot travel trailer to return home. Before beginning the

drive, Respondent, a former driver and driving safety instructor for UPS and FedEx, thoroughly inspected his pickup and trailer.

The Shauers left Pactola Lake campground and traveled south on Highway 385, a two-lane, blacktop highway. Respondent was driving, his wife rode in the front passenger seat, and their two children were in the back seat. After traveling approximately ten miles on Highway 385, Respondent approached the intersection of Highway 385 and Sheridan Lake Road.[1]

The evidence at trial showed that as Respondent approached the intersection – at a speed less than the posted 55 miles per hour limit – Petitioner failed to yield, pulled out directly in front of Respondent, and then attempted to return to Sheridan Lake Road.[2] Petitioner's maneuver in heavy moving traffic created a dangerous situation giving Respondent little time to avoid an accident. Respondent braked and attempted to drive around Petitioner, but Respondent's travel trailer clipped Petitioner's motor-

---

[1] Sheridan Lake Road is a two-lane blacktop highway. At the intersection with Highway 385, Sheridan Lake Road divides into a Y-shaped road, with a north and south fork, approximately 100 feet apart, allowing access onto Highway 385. A stop sign controls traffic entering Highway 385 from either fork of Sheridan Lake Road, requiring traffic entering Highway 385 to stop and yield to vehicles on the busier Highway 385.

[2] The evidence conflicted as to whether Petitioner pulled out from the south fork and made a u-turn back to Sheridan Lake Road or whether he pulled out from the north fork, drove less than 100 feet south, and attempted to stop and turn left back to Sheridan Lake Road.

cycle. Petitioner lost control of his motorcycle and went off the road, sustaining injuries resulting in the surgical amputation of his lower left leg.

B. District Court Proceedings

On December 12, 2008, Petitioner sued Respondent in the United States District Court for the District of South Dakota, alleging that Respondent was negligent and that his negligence was a proximate cause of Petitioner's injuries. Respondent denied that he was negligent and asserted that Petitioner was contributorily negligent to a degree more than slight, thereby barring his recovery under South Dakota law.

1. Jury Selection and *Voir Dire*

Prior to the trial, the district court required potential jurors to complete and return questionnaires seeking basic personal information such as age, occupation, and education level. The questionnaires were made available to counsel.

The jury trial before United States District Judge Jeffrey L. Viken began September 20, 2010. Eighteen prospective jurors were randomly-selected from the jury pool, and the court explained the jury trial procedure to them. (J.A.34-38.) The court asked some general, preliminary questions about the prospective jurors' ability to serve and specifically asked whether they knew any of the witnesses who might be called or attorneys in the case. (J.A.38,41-45.) The court asked these questions without input or comment from the attorneys for either side.

As is customary in the District of South Dakota and as the local rules provide, the court then allowed

each attorney time to conduct *voir dire* examination. Petitioner's counsel was given unrestricted time for *voir dire* questioning. He asked both general and specific questions; at times, he polled each juror on the same question. For example, Petitioner's counsel asked specific questions seeking information as to whether the jurors knew anything about the case, the lawyers, or the parties. (J.A.46-49.) He asked whether anyone had prior jury duty experience. (J.A.49-56.) He requested specific information as to whether any juror had ever sued anyone. (J.A.57.) He inquired if anyone had a close family friend or family member that had lost a limb, or whether a close friend or relative lived with chronic pain. (J.A.99-103.) He asked specific questions about whether anyone had driven a motorcycle or pulled a trailer behind their vehicle. (J.A.93-97.)

Petitioner's counsel also asked general questions about the jurors' opinions on the civil justice system (J.A.59-60,66-67), lawsuits (J.A.74), the burden of proof (J.A.74-76), and fairness and impartiality (J.A.73-74). He inquired if the jurors could award damages for past and future medical expenses and damages for pain and suffering, "if we prove our case." (J.A.80-88.)

Petitioner's counsel did not, however, during his entire, uninterrupted one-hour-and-twenty-minute *voir dire* examination, ask the panel collectively or individually, the specific question that would have elicited the precise response Petitioner contends Juror Whipple withheld: namely, whether the jurors, their close friends or family members had ever been involved in an accident that resulted in serious bodily injury or death. In fact, he told the jurors that

they did not have to put their personal life experiences aside and that "we can't shut out everything in the past and no lawyer or judge can expect you to do that" (J.A.70), and "you can't just—everything, your life experience, you can't just throw it out the window." (J.A.73.)

Respondent's counsel also conducted *voir dire*. He asked prospective jurors if they would have any problem returning a verdict for Respondent if they decided that Petitioner caused the accident by failing to yield to Respondent. (J.A.106-07.) He asked specific questions about jurors' experiences riding motorcycles and driving vehicles while pulling trailers. (J.A.139,164-77.) He inquired if any juror had been involved in an accident where a vehicle had pulled out in front of them. (J.A.177-82)

Respondent's counsel addressed the issue of sympathy and specifically engaged in the following colloquy with Juror Whipple (who would become foreperson):

> MR. KAPPELMAN: Thank you. Now, Ms. Whipple, I want to ask you about this idea of sympathy. Vitally important here because we all know Mr. Warger lost his leg. We know that everybody is sympathetic to Mr. Warger; that is a given. I need to make sure from every one of you that that is not going to decide this case because if that decided the case, well, then, we can just all go home. All right?
>
> MS. WHIPPLE: Yes.

> MR. KAPPELMAN: So how do you feel about that?
>
> MS. WHIPPLE: I would not let that enter—you know, sway my decision any. I want to hear the facts and make a decision on the facts and not on sympathy.
>
> MR. KAPPELMAN: You would be able to set that sympathy idea aside and just decide it upon what really happened?
>
> MS. WHIPPLE: Yes.
>
> MR. KAPPELMAN: And that's going to come from the witnesses on the witness stand?
>
> MS. WHIPPLE: Yes.

(J.A.154.) Respondent's counsel questioned the entire jury panel on this issue. (J.A.146-62.)

After each side exercised its three allotted peremptory challenges and the twelve jurors were sworn, the court read Preliminary Jury Instruction No. 1. This instruction included a brief statement of the case and instructed that the jury had "a right to consider the common knowledge possessed by all of you, together with the ordinary experiences and observations in your daily affairs of life." (J.A.19-20.)

2. Final Jury Instructions

At the close of evidence, the court read the jury instructions to the jury. Final Instruction No. 9 defined contributory negligence, according to South Dakota law, as "negligence on the part of a plaintiff which, when combined with the negligence of a defendant, contributes as a legal cause in the bringing about the injury to the plaintiff." (J.A.26.) Final In-

struction No. 9 also instructed the jury as to the meaning of "slight" when comparing negligence of the parties, and stated that "if you find Mr. Warger's contributory negligence is more than slight when compared with the negligence of Mr. Shauers, then Mr. Warger is not entitled to recover any damages." (J.A.26-27.)

During deliberations, the jury sent a note to the court asking a two-part question concerning liability: "If finding Warger's negligence is greater than slight is that the same as finding a verdict for the defendant?" and "How would you communicate that?" (J.A.21.) The court's written response referred the jurors to Instruction No. 9 defining contributory negligence, Instruction No. 24 listing the issues to be decided and instructing them to determine the question of liability before fixing an amount for damages, and Instruction No. 27 outlining their duties during deliberations. (J.A.21-22,26-31.) Shortly thereafter the jury of twelve returned a unanimous verdict for Respondent.

3. Petitioner's Post-Trial Motion and Juror Titus's Affidavit

Petitioner moved post-trial for judgment as a matter of law, or in the alternative, for a new trial, on various grounds, including the alleged insufficiency of the evidence to support the jury's verdict. As relevant here, Petitioner contended that the verdict should be vacated and a new trial granted because the verdict was the product of juror misconduct. (Resp.Opp.App.2.) Petitioner's claim of juror misconduct was based solely on the Affidavit of Stacey Titus, who had joined in the unanimous verdict for

Respondent. According to his affidavit, Juror Titus approached Petitioner's counsel regarding a statement purportedly made during deliberations by Juror Whipple. Juror Titus's concerns as stated in his affidavit were as follows:

> The biggest concern I had during jury deliberations was the attitude and comments by some of the jurors to not consider the facts and evidence of the case. It was evident to me [Mr. Titus] that one juror, who ended up being the foreman, was influenced by her own daughter's experience, and not the facts, evidence, and law that was presented to us.
>
> The juror, who ended up being the foreperson, during deliberations spoke about her daughter's experience, which included a motor vehicle collision in which her daughter was at fault for the collision and a man died. She related that if her daughter had been sued, it would have ruined her life. She further indicated that her daughter sat down and visited with the family of the deceased person and gave them flowers at the 5 year anniversary of the collision.
>
> It is obvious that this juror was more concerned about the issues involving her daughter than she was the facts, evidence, and law presented by this Court and counsel. It was apparent that this comment may have been made to and influenced other jurors because other jurors also expressed their concern about ruining the Shauers' life as they were a young couple.

* * *

> I am still concerned regarding the bias expressed by this juror. I am concerned that the juror influenced other jurors by stating that her daughter's life would have been ruined if a lawsuit had been filed against her in her collision.

(Pet.App.40a-41a.) Notably absent from Mr. Titus's affidavit were any accusation that Juror Whipple had been dishonest during *voir dire*, any indication of what specific question, if any, she answered dishonestly, or any explanation as to why he joined the unanimous verdict if he had such concerns during deliberations.

Petitioner offered no additional affidavits from any of the other eleven jurors, nor did he move for an evidentiary hearing. He offered no deposition testimony nor did he submit any other evidence in support of his motion.

C. The District Court's Decision

The district court denied Petitioner's post-trial motion on all grounds. As to Juror Whipple's alleged dishonesty during *voir dire*, the court held that "[r]egardless of how [Petitioner] hopes to use [Juror Titus's] statements at issue, Rule 606(b) bars their admission unless the statements fall within one of the enumerated exceptions to Rule 606(b), which the court finds they do not." (Pet.App.35a-38a.) The court emphasized that "[t]o allow statements made during jury deliberations to be used to challenge a juror's conduct during voir dire would undermine the purpose of Rule 606(b) and runs counter to its directive." (Pet.App.38a.)

D. The Eighth Circuit's Decision

Petitioner appealed to the Eighth Circuit, which unanimously affirmed the district court's decision. The Eighth Circuit held that the jury's verdict for Respondent was supported by sufficient evidence, stating that "both parties presented conflicting expert testimony" and that the jury "heard significant evidence in favor of Shauers." (Pet.App.6a.) Addressing the issue raised by Mr. Titus's affidavit, the Eighth Circuit stressed that "'Rule 606(b) establishes very strict requirements for accepting testimony from jurors about their deliberations, and trial courts should be hesitant to accept such testimony without strict compliance with the rule.'" (Pet.App.7a (citation omitted).) The Eighth Circuit explained,

> Congress, when drafting Rule 606(b), made no exception for the admittance of such evidence. "[T]he legislative history demonstrates with uncommon clarity that Congress specifically understood, considered, and rejected a version of Rule 606(b) that would have allowed jurors to testify on juror conduct during deliberations. . ." *Tanner v. United States*, 483 U.S. 107 (1987). We decline to create an exception to the rule here. In order to achieve finality in the litigation process and avoid relentless post-verdict scrutiny and second guessing, occasional inappropriate jury deliberations must be allowed to go unremedied.

(Pet.App.10a.) The Eighth Circuit held that "Rule 606(b) precludes jurors from testifying in regards to

jury deliberations for the purpose of challenging a verdict." (*Id.*) The Eighth Circuit rejected Petitioner's assertion that Juror Whipple's personal experiences "constitute[d] extraneous information" improperly brought before the jury as an exception within Rule 606(b)(2)(A). (Pet.App.7a.) The Eighth Circuit also rejected Petitioner's argument that "Rule 606(b) should not exclude the affidavit because it is not being used to challenge the verdict, but rather to show a juror was dishonest during voir dire." (Pet.App.8a.)

SUMMARY OF ARGUMENT

Petitioner asks this Court to hold that Federal Rule of Evidence 606(b) does not exclude a juror's testimony as to statements made by another juror during deliberations if the evidence of those statements is used to show that the juror was dishonest at *voir dire* and that a new trial should be granted. In the district court, Petitioner sought to support his motion to vacate the verdict and for a new trial with purported evidence that a member of the jury, Regina Whipple, was intentionally dishonest on *voir dire* in failing to disclose that her daughter had been at fault in a fatal car accident. The evidence Petitioner asked the district court to consider was an affidavit by another juror, Stacey Titus, describing Juror Whipple's statements during jury deliberations. The ruling that Petitioner urges this Court to make would be contrary to the plain language of Rule 606(b), to the legislative history of the Rule, and to the "long-recognized and very substantial" policy concerns that underlie the Rule. *See Tanner v. United States*, 483 U.S. 107, 127 (1987). It is also contra-

ry to the weight of authority in the Circuit Courts, including the well-reasoned opinions of the Tenth Circuit in *United States v. Benally*, 546 F.3d 1230 (10th Cir. 2008), *cert. denied*, 558 U.S. 1051 (2009), the Third Circuit in *Williams v. Price*, 343 F.3d 223 (3d Cir. 2003), and the Eighth Circuit in this case.

Under the plain language of Rule 606(b)(1), the Eighth Circuit was correct in affirming the district court's ruling that the affidavit of Juror Titus was not admissible to support Petitioner's motion to vacate the verdict and for a new trial on grounds of the purported dishonesty by Juror Whipple in her statements on *voir dire*. Rule 606(b)(1) specifies (i) the kind of proceeding in which the Rule applies ("[d]uring an inquiry into the validity of a verdict or indictment"), and (ii) the categories of evidence that the Rule excludes (a juror's testimony, affidavit or evidence "about any statement made or incident that occurred during the jury's deliberations; the effect of anything on that juror's or another juror's vote; or any juror's mental processes concerning the verdict or indictment").

Petitioner argues that Rule 606(b) applies only to proceedings that challenge the *manner* in which the jury reached its verdict. That argument is not supported by the language of the Rule. Petitioner erroneously reads the language specifying the categories of evidence precluded by the Rule as imposing a limitation on the kind of proceeding to which the Rule is applicable. However, under the Rule's plain language, the Rule applies to any "inquiry into the validity of a verdict." There is no language in the Rule limiting its application to challenges to a verdict that

are based upon improprieties in the manner in which the jury deliberated and reached its verdict.

Petitioner's challenge to the verdict based upon Juror Whipple's alleged failure at *voir dire* to disclose her purported bias in favor of Respondent, as evidenced by statements she is alleged to have made during deliberations, falls squarely under the Rule, and Juror Titus's affidavit was properly excluded. The improper interpretation of Rule 606(b) urged by Petitioner, allowing juror testimony through the "backdoor of a voir dire challenge," risks "swallowing the rule," as a "broad question during voir dire could then justify the admission of any number of jury statements that would now be re-characterized as challenges to voir dire rather than challenges to the verdict." *Benally*, 546 F.3d at 1236.

Petitioner incorrectly asserts that an inquiry into purported juror dishonesty during *voir dire* pursuant to *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548 (1984), is not an inquiry into the "validity of the verdict" for purposes of Rule 606(b). Rule 606(b) was not at issue in *McDonough*, where the proffered evidence of a juror's alleged dishonesty during *voir dire* was an affidavit of a non-juror describing the Navy "enlistment application" of the juror's son. *Id.* at 550-51. As Justice Alito pointed out in *Williams*, *McDonough* "addressed the right of a party to obtain a new trial upon making a particular showing, not the admissibility of evidence to make that showing." *Williams*, 343 F.3d at 229. Nothing in *McDonough* supports Petitioner's argument that a *McDonough* challenge does not involve an inquiry into the validity of the verdict and that therefore

Rule 606(b) does not apply to exclude evidence of jury deliberations.

Plaintiff also relies extensively on *Clark v. United States*, 289 U.S. 1 (1933), as the source of the purported common law principle that evidence of jury deliberations is admissible to prove dishonesty during *voir dire* "in the context of a motion for a new trial." (Pet.Br.13-14.) In fact, in *Clark*, this Court expressly stated that the rule against jurors impeaching their verdict "[wa]s wholly unrelated to the problem" before the Court in that case, namely, the use of juror testimony in a separate contempt proceeding against a dishonest juror. *Clark*, 289 U.S. at 18. Moreover, because the juror had caused a hung jury in the underlying mail fraud case, "there was no verdict, and hence none to be impeached" in *Clark*. *Id.* Thus, as the Tenth Circuit stated in *Benally*, *Clark* permits use of juror testimony to show dishonesty during *voir dire* for purposes of contempt proceedings. *Benally*, 546 F.3d at 1235. However, "it does not follow" from *Clark* "that juror testimony that shows a failure to answer honestly during voir dire can be used to overturn the verdict." *Id.*

The exception set forth in Rule 606(b)(2)(A) for "extraneous prejudicial information improperly brought to the jury's attention" does not allow evidence of Juror Whipple's statements during deliberation. Her statements, as evidenced by Juror Titus's allegations, concerned her own personal experience and feelings regarding a car accident in which her daughter was at fault. The case law overwhelmingly holds that such personal experiences and feelings are not extraneous prejudicial information. Ms. Whipple's alleged statements did not constitute in-

formation not in evidence concerning the facts of Petitioner's motorcycle accident and injuries. Her statements did not relay newspaper or social media accounts of the facts of the case to the other jurors and did not constitute any other form of extraneous prejudicial information to which Rule 606(b) (or its common law predecessors) have been held to apply.

Petitioner's interpretation of Rule 606(b) is also contrary to the legislative history and the purpose of the Rule. The legislative history is clear that Congress and the drafters of Rule 606(b) intended a broad, comprehensive exclusion of precisely the kind of evidence proffered here by Petitioner. *See* S. Rep. No. 93-1277, at 13-14 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7051, 7060 ("In the interest of protecting the jury system and the citizens who make it work, rule 606 should not permit any inquiry into the internal deliberations of the jurors.") (quoted in *Tanner*, 483 U.S. at 124-25). Neither Petitioner's appeals to the common law nor Petitioner's reliance on the principle of constitutional avoidance justify disregarding the plain language of the Rule and the intent and purpose of Congress as expressed in the legislative history.

Rule 606(b) serves the all-important purposes of promoting freedom of juror deliberation, ensuring the finality of verdicts, shielding jurors from harassment by dissatisfied litigants, and protecting the jury system. If Petitioner's argument were to be accepted, a juror's pledge at *voir dire* to be impartial and to follow the trial judge's instructions could later be questioned as "dishonest" based upon statements reportedly made by the juror during jury deliberations. As Justice Alito has stated in *Williams*, allow-

ing juror testimony in order to show juror dishonesty on *voir dire* "may be thought to create the potential for the very sort of problems that the 'no impeachment' rule is designed to prevent, including in particular the post-trial harassment of jurors in the hope that one will recount a remark by a fellow juror that can be construed as evidence that this juror lied during voir dire." *Williams*, 343 F.3d at 236-37.

Petitioner's contentions should be rejected for the further reason that Petitioner has failed to meet the requirements established by this Court in *McDonough*, 464 U.S. at 556, that to obtain a new trial, a party must show (i) that a juror intentionally failed to answer honestly a material question on *voir dire* and (ii) that a correct response would have provided a valid basis for a challenge for cause. Petitioner cites no testimony or other evidence—and indeed there is none—that Juror Whipple responded dishonestly to any question actually posed to her on *voir dire*. Neither she nor any other juror was asked on *voir dire* whether the juror or a family member had ever been in a car accident that resulted in injury or death. Courts have unanimously held that the first *McDonough* requirement is not met where, as here, a juror merely failed to volunteer information during *voir dire* that was not asked for. Furthermore, as demonstrated by the *voir dire* proceedings in this case, Juror Whipple would not have been dismissed for cause based on that information, as required by *McDonough*. As this Court stated in *McDonough*, "[a] trial represents an important investment of private and social resources, and it ill serves the important end of finality to wipe the slate clean simply to recreate the peremptory challenge

process because counsel lacked an item of information which objectively he should have obtained from a juror on *voir dire* examination." 464 U.S. at 555.

Accordingly, for these reasons and those set forth below, the judgment of the Eighth Circuit should be affirmed.

ARGUMENT

I. THE PLAIN LANGUAGE OF RULE 606(b) PRECLUDES EVIDENCE OF JUROR WHIPPLE'S STATEMENTS DURING DELIBERATIONS TO INVALIDATE THE VERDICT

A. Juror Titus's Affidavit Falls Squarely Within the Prohibition of Rule 606(b)

The plain language of Rule 606(b) prohibits Petitioner's proposed use of Juror Titus's affidavit to obtain a new trial in this case. Rule 606(b)(1) prohibits a court, "[d]uring an inquiry into the validity of a verdict," from receiving testimony or evidence "about any statement made or incident that occurred during the jury's deliberations; the effect of anything on that juror's or another juror's vote; or any juror's mental processes concerning the verdict." Fed. R. Evid. 606(b)(1). The court "may not receive a juror's affidavit or evidence of a juror's statement on these matters." *Id.* By its terms the Rule applies to all efforts to "inquir[e] into the validity of a verdict" and clearly defines the categories of evidence that are excluded.

The Rule's prohibition on juror testimony and affidavits clearly encompasses the affidavit of Juror Ti-

tus, which Petitioner submitted to the district court in support of his motion to set aside the verdict on the basis of, *inter alia*, purported juror misconduct and purported juror dishonesty on *voir dire*. (*See* Resp.Opp.App.4,12-15.) Mr. Titus's affidavit described statements allegedly made by Juror Whipple during deliberations. The affidavit also referenced what other jurors thought about Ms. Whipple's comments and set forth Mr. Titus's speculation that her comments may have influenced other jurors. (Pet.App.40a-41a.)

Petitioner incorrectly contends that Juror Titus's affidavit is not subject to exclusion under Rule 606(b)(1) because "an inquiry into juror dishonesty during voir dire does not constitute an 'inquiry into the validity of the verdict.'" (Pet.Br.12; *see also id.* at 16-23.) As an initial matter, an inquiry into juror dishonesty at *voir dire*, in a proceeding aimed at vacating the verdict, necessarily is an inquiry into the validity of the verdict. Petitioner provides no authority that would support giving a narrow meaning to the words "validity of the verdict" such that the language of the Rule would not apply to an inquiry as to whether a verdict should be invalidated because a juror allegedly was dishonest during *voir dire*.

Moreover, Petitioner's contention misstates the Rule, which does not limit its application to inquiries which *constitute* "inquir[ies] into the validity of the verdict," but broadly applies to all proceedings that take place "[*d*]*uring* an inquiry into the validity of a verdict." Fed. R. Evid. 606(b)(1) (emphasis added). Here, Petitioner offered Juror Titus's affidavit as evidence *during* the district court's adjudication of his motion to vacate the verdict and for a new trial,

which was certainly an inquiry into the validity of the verdict. The "inquiry into juror dishonesty during voir dire" requested by Petitioner unquestionably was part of and occurred during the district court's post-trial inquiry into the validity of the verdict.

A judicial inquiry into juror misconduct or dishonesty during *voir dire* does not occur without some larger context. Such an inquiry would take place for an ultimate purpose, *e.g.*, in a contempt or perjury proceeding against a juror, or, when juror misconduct is brought to the court's attention during trial, for purposes of determining whether a mistrial should be granted or a juror removed. Here, Petitioner sought to introduce evidence of purported juror misconduct and dishonesty during *voir dire* as part of an inquiry into the validity of the verdict. If the purpose of a proceeding is to attack the validity of the verdict, as it was here, to allow such evidence, by characterizing the inquiry as one into juror dishonesty during *voir dire*, is manifestly an evasion of the plain language of Rule 606(b)(1).

Petitioner's attempt to separate an "inquiry into juror dishonesty during voir dire" from the ultimate purpose of that inquiry, here, namely, to impeach the verdict, is an artificial and untenable distinction. As the Tenth Circuit explained in rejecting that same purported distinction, "[a]lthough the immediate purpose of introducing the testimony [of racist remarks made by jurors during deliberations] may have been to show that the two jurors failed to answer honestly during voir dire, the sole point of this showing was to support a motion to vacate the ver-

dict, and for a new trial. That is a challenge to the validity of the verdict." *Benally*, 546 F.3d at 1235.[3]

The holding requested by Petitioner that Rule 606(b) does not apply to juror statements that may "tend to show" dishonesty during *voir dire* would eviscerate Rule 606(b)'s prohibition of evidence regarding jury deliberations. Indeed, it is difficult to imagine a case that could not be re-characterized to fit within Petitioner's proposed interpretation of the Rule. Under Petitioner's view of the Rule, any time a juror was reported to have said anything that a party could represent as contradicting the juror's pledge during *voir dire* to be impartial and to follow the court's instructions, the party would be entitled to present the juror's statements to the court as part of an "inquiry into juror dishonesty during voir dire," on a motion to overturn the verdict. (Pet.Br.12,16-23.)

Petitioner also seeks to support his contention that Rule 606(b) simply does not apply by concocting a meritless distinction between a court's "inquiry" into juror dishonesty at *voir dire* and the "remedy" for

---

[3] In addition to the Tenth Circuit in *Benally*, the Third Circuit in *Williams*, 343 F.3d at 236-37, and the Eighth Circuit in this case (Pet.App.8a-10a) agree that Rule 606(b) precludes the use of juror testimony regarding statements made in jury deliberations to support a challenge to a juror's honesty during *voir dire*. To the extent they hold to the contrary, the Ninth Circuit's decisions in *Hard v. Burlington Northern Railroad*, 812 F.2d 482 (9th Cir. 1987), cited by Petitioner (Pet.Br.42), and *United States v. Henley*, 238 F.3d 1111 (9th Cir. 2001), provide no reasoned analysis of the language of Rule 606(b). As was stated in *Williams*, 343 F.3d at 235 n.5, *Hard* "is inconsistent with" Rule 606(b).

that juror dishonesty (*i.e.*, vacating the verdict). According to Petitioner, the "focus of Rule 606(b)(1) is not on the remedy for the claim at issue; it is on the 'inquiry' in which a court must engage to resolve that claim in the first instance." (Pet.Br.21-22.) Petitioner's attempt to separate the *McDonough* inquiry from the "remedy" that is available "once the [*McDonough*] inquiry has been completed" (Pet.Br.22) has no support in the language of Rule 606(b) or in the case law. Contrary to Petitioner's argument, the broad language of the Rule—"during an inquiry into the validity of a verdict"—does not support a distinction between different grounds for invalidating a verdict. As Justice Alito wrote in *Williams*, the argument that "the 'no impeachment' rule simply does not apply when a defendant seeks to introduce evidence to support 'a claim of juror misconduct committed during voir dire' is plainly too broad." 343 F.3d at 235. "If it were correct, a party could call jury members to testify about statements made during actual jury deliberations so long as the purpose for introducing the evidence was to show that a juror had lied during voir dire." *Id.*

Nothing in *McDonough* itself supports treating a *McDonough* claim differently from other inquiries into the validity of a verdict. The claim of juror dishonesty in *McDonough* was based on a non-juror's affidavit describing the Navy "enlistment application" of the son of one of the jurors. 464 U.S. at 550-51. According to the affidavit, the application referred to the fact that the juror's son had broken a leg in an accident with an exploding tire, thus supposedly demonstrating that the juror was dishonest when he did not respond to the specific question, addressed to the panel as a whole, whether any of the

prospective jurors or their immediate family members had sustained any severe injury from an accident that had resulted in any disability or prolonged pain and suffering. *Id.* at 449-50. As the Third Circuit stated, *McDonough* "addressed the right of a party to obtain a new trial upon making a particular showing, not the admissibility of evidence to make that showing." *Williams*, 343 F.3d at 229. In *McDonough*, this Court did not have to consider the specific language or the public policy that supports Rule 606(b) because there was no attempt to use discussions during jury deliberations to support the claim of juror dishonesty during *voir dire*.

The plain language of Rule 606(b) also is contrary to Petitioner's argument that the Rule is concerned only with protecting the privacy of the *manner* of the jury's decision-making and is not concerned with protecting the privacy of juror statements made during deliberations that are relevant to the accuracy of a juror's answers at *voir dire*. (*See* Pet.Br.14,29-34.) The Rule does not distinguish between statements during deliberations that affected the verdict and those that did not or those that are relevant to *voir dire*. As the Third Circuit in *Williams* pointed out, Rule 606(b) "categorically bar[s] juror testimony 'as to *any* matter or statement occurring during the course of the jury's deliberations' even if the testimony is not offered to explore the jury's decision-making process in reaching the verdict." 343 F.3d at 235 (emphasis added). There is no language in Rule 606(b) that supports Petitioner's attempt to limit the Rule to statements that are relevant to the "manner" in which the jury reached its verdict or to matters that "inhere" in the verdict and to challenges to the verdict that are based solely on improprieties in de-

liberations. (Pet.Br.29-30.) "[I]mportant voir dire questions typically focus on matters that may well affect juror's decision-making processes and, therefore, allowing a juror to testify for the purpose of showing that another juror lied during voir dire may not be viewed as much different from permitting an inquiry into the decision-making process itself." *Williams*, 343 F.3d at 236.

The record here demonstrates that Petitioner used Mr. Titus's affidavit to speculate on, and attempt to impeach, the jury's decision-making process. Mr. Titus's affidavit states that he "was concerned about what had transpired in deliberations," that "[t]he biggest concern I had during jury deliberations was the attitude and comments by some of the jurors to not consider the facts and evidence of the case," that it was evident to him that "one juror, who ended up being the foreman, was influenced by her own daughter's experience, and not the facts, evidence, and law that was presented to us," and that this juror "spoke about her daughter's experience, which included a motor vehicle collision in which her daughter was at fault for the collision and a man died [and] related that if her daughter had been sued, it would have ruined her life." (Pet.App.40a.) Mr. Titus also affides that "[i]t [wa]s obvious that this juror was more concerned about the issues involving her daughter than she was the facts, evidence, and law presented by this Court and counsel" and that "[i]t was apparent that this comment may have been made to and influenced other jurors because the other jurors also expressed their concern about ruining the Shauers' life as they were a young couple." (Pet.App.41a.) Mr. Titus was "concerned about the dilemma of the juror ignoring the dictates

of the Court and the law" and was "concerned that the juror influenced other jurors." (*Id.*) In short, the jury's decision-making process was squarely placed at issue by Mr. Titus's affidavit, and therefore Rule 606(b) applies.

In *Benally*, the Tenth Circuit stressed that

> allowing juror testimony through the back-door of a voir dire challenge risks swallowing the rule. A broad question during voir dire could then justify the admission of any number of jury statements that would now be re-characterized as challenges to voir dire rather than challenges to the verdict. Given the importance that Rule 606(b) places on protecting jury deliberations from judicial review, we cannot read it to justify as large a loophole as [defendant] requests.

Benally, 546 F.3d at 1236. Under the limited application of Rule 606(b) advocated by Petitioner, it could always be argued by one side or the other that a juror's statements during deliberations show that the juror was "dishonest" when he or she pledged to be impartial and to follow the court's instructions. The sanctity of the jury room and the statements made within it are central to the goals of Rule 606(b) and to its underlying policies and principles. The use of such statements to invalidate a verdict in cases such as this constitutes precisely the kind of intrusion into jury deliberations that the Rule is designed to prevent.

B. Rule 606(b)(2)(A)'s Exception for "Extraneous Prejudicial Information" Does Not Apply in This Case

1. A Juror's Personal Experiences and Biases Are Not Extraneous Prejudicial Information

Petitioner contends, in the alternative, that post-verdict juror testimony regarding jury deliberations tending to show juror dishonesty during voir dire is admissible under Rule 606(b)(2)(A)'s exception for "extraneous prejudicial information improperly brought to the jury's attention." (Pet.Br.46.)[4] The plain meaning of the words "extraneous prejudicial information," however, does not extend to a juror's own experiences, knowledge, values, and beliefs.

The Eighth Circuit correctly held that Ms. Whipple's comments in the jury room were not "extraneous information." (Pet.App.7a.) The Eighth Circuit distinguished "juror testimony regarding 'objective events or incidents from juror testimony regarding possible subjective prejudices or improper motives of individual jurors, which numerous courts and commentators have held to be within the rule rather than the exception of 606(b).'" (*Id.* (citation omitted).) As the Eighth Circuit stated, "[j]urors' personal experiences do not constitute extraneous information; it is unavoidable they will bring such innate experiences into the jury room." (*Id.*) In

---

[4] Petitioner does not contend that the other two exceptions under Rule 606(b)(2), for juror testimony regarding outside influences brought to bear on any juror and for mistakes made in entering the verdict on the verdict form, apply in this case.

short, "the evidence excluded by the district court concerns an alleged bias held by a jury member. It did not concern extraneous information improperly brought before the jury." (*Id.*)

The Eighth Circuit's decision is overwhelmingly supported by the case law. Indeed, Petitioner's argument has been rejected essentially unanimously by the courts, which distinguish between external influences—such as "'publicity received and discussed in the jury room, consideration by the jury of evidence not admitted in court, and communications or other contact between jurors and third persons, including contacts with the trial judge outside the presence of defendant and his counsel'"—and the jurors' own experiences, motives and influences. *United States v. Campbell*, 684 F.2d 141, 151 (D.C. Cir. 1982) (citation omitted); *see also United States v. Wilson*, 534 F.2d 375, 378-79 (D.C. Cir. 1976); *Gov't of the Virgin Islands v. Gereau*, 523 F.2d 140, 149-50 (3d Cir. 1975). As the Third Circuit stated in *Williams*, an extraneous influence does not include "'the motives and influences which affected [the jury's] decision.'" 343 F.3d at 232 (citing *Mattox v. United States*, 146 U.S. 140, 149 (1892), and *McDonald v. Pless*, 238 U.S. 264, 269 (1915)).

That same distinction was made by the Fifth Circuit in *United States v. Duzac*, 622 F.2d 911, 913 (5th Cir. 1980). In *Duzac*, the defendants learned that one or more jurors were influenced by prior personal experiences and moved for a new trial on that ground. The Fifth Circuit found that Rule 606(b) prohibited inquiry into the verdict and no exception applied, explaining that:

> Here, there is no evidence that any external influence was brought to bear on members of the jury. The prejudice complained of is alleged to be the product of personal experiences unrelated to this litigation. The proper time to discover such prejudices is when the jury is being selected and peremptory challenges are available to the attorneys. Although the jury is obligated to decide the case solely on the evidence, its verdict may not be disturbed if it is later learned that personal prejudices were not put aside during deliberations.

Duzac, 622 F.2d at 913.

Accordingly, "[t]he general rule is that courts may properly inquire only into external influences on the jury, such as if a juror improperly read a newspaper in the jury room or was involved in bribery." *United States v. Cornelius*, 696 F.3d 1307, 1325 (10th Cir. 2012). "[L]ife experiences do not constitute extraneous prejudicial information and may be brought into the jury room." *Marcavage v. Bd. Of Trs. of Temple Univ.*, 400 F. Supp. 2d 801, 805 (E.D. Pa. 2005). Thus, a juror's "information about the facts" of the alleged events at issue in the case is extraneous prejudicial information for purposes of Rule 606(b), while "general community knowledge" is not. *Titus v. State*, 963 P.2d 258, 264 (Alaska 1998). Decisions such as these are based on the "sound proposition that jurors 'can make intelligent decisions only by drawing upon their accumulated background knowledge and experience.'" *Id.* at 262 (quoting 27 Charles Wright & Victor Gold, *Federal Practice and Procedure* §6075, at 450 (1990)).

Moreover, courts have recognized that "a complete sanitizing of the jury room" is not only impossible, but undesirable. *United States v. McKinney*, 429 F.2d 1019, 1022-23 (5th Cir.), *modified on reh'g on other grounds*, 434 F.2d 831 (5th Cir. 1970). "Jurors are not expected to come into the jury box and leave behind all that their human experience has taught them." *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 149 (1994) (O'Connor, J., concurring) (quoting *Beck v. Alabama*, 447 U.S. 625, 642 (1980)) (quotation marks omitted). As the Fifth Circuit stated,

> We cannot expunge from jury deliberations the subjective opinions of jurors, their attitudinal expositions, or their philosophies. These involve the very human elements that constitute one of the strengths of our jury system, and we cannot and should not excommunicate them from jury deliberations. Nevertheless, while the jury may leaven its deliberations with its wisdom and experience, in doing so it must not bring extra-facts into the jury room. In every criminal case we must endeavor to see that jurors do not "testify" in the confines of the jury room concerning specific facts about the specific defendant then on trial.

McKinney, 429 F.2d at 1022-23; *accord Shillcutt v. Gagnon*, 827 F.2d 1155, 1159 (7th Cir. 1987). Thus, the jury "is not a sterile institution," and it "would be naive to suggest that individual jurors leave all their preconceptions, values and insights on the doorstep when they enter the jury room." *Bulger v. McClay*, 575 F.2d 407, 412 (2d Cir. 1978). Rather, courts "encourage jurors to bring their experiences to bear dur-

ing deliberation." *Id.* Here, there is no claim that Juror Whipple knew "specific facts" about Petitioner, Respondent, or the accident and brought those facts into the "crucible of decision." *See id.*

The jury in this case was specifically instructed that the jurors had "a right to consider the common knowledge possessed by all of you, together with the ordinary experiences and observations in your daily affairs of life." (J.A.20.) That Petitioner's counsel in this case may not have been as effective on *voir dire* as Petitioner in hindsight would have liked (*see supra* at 4-5; *infra* at 50-51) does not transform Juror Whipple's personal life experiences into "extraneous information" for purposes of Rule 606(b)(2)(A).

2. *United States v. Boney* Does Not Support Application of the Rule 606(b)(2)(A) Exception in This Case

In contending that the extraneous information exception applies, Petitioner relies extensively and exclusively on *United States v. Boney*, 68 F.3d 497 (D.C. Cir. 1995). (Pet.Br.46-47.) In *Boney*, during *voir dire*, a juror "undisputedly lied in concealing a felony conviction," a fact that would by statute have disqualified him from serving on the jury. 68 F.3d at 502. The D.C. Circuit held that, in ruling on the defendant's motion for a new trial, the trial court should have asked more probing questions of the juror, including as to "whether his felon status ever came up during jury deliberations, and, if so, the circumstances surrounding that disclosure." *Id.* at 503. The D.C. Circuit concluded that such questioning was not prohibited by Rule 606(b), as the juror's "experience as a felon is the one matter that should not

have been before the jury at all because no ex-felons should have been on the panel" and thus fell within the "extraneous prejudicial information" exception to Rule 606(b)'s general prohibition on juror testimony. *Id.*

Petitioner purports to find the circumstances in *Boney* analogous to the circumstances here, claiming that "[i]f Ms. Whipple had disclosed that her own daughter had been at fault in a fatal automobile accident—and that, as a result, she was unwilling to award damages to the victim of a traffic accident—she would surely have been struck for cause," and that therefore, as in *Boney*, her experiences "'should not have been before the jury at all'" and "thus constituted 'extraneous' information." (Pet.Br.46-47.) As an initial matter, there is no evidence that Ms. Whipple "was unwilling to award damages to the victim of a traffic accident" or that she (or any other juror) actually voted on that basis. In fact, since the jury unanimously voted in favor of Respondent after asking a question about contributory negligence and its impact, the inference is that the jury's verdict was based on the evidence presented.

Juror Titus's affidavit gives no information as to the context in which Ms. Whipple's discussion of her daughter's accident occurred. Presumably, if Juror Titus had been able to affide that Ms. Whipple was unwilling in any circumstances to award damages to the victim of a traffic accident (as Petitioner now claims), Petitioner's attorneys would have included that statement in his affidavit. In addition, unlike the juror in the *Boney* case, Juror Whipple did not answer falsely in response to questions asked during *voir dire*. She was simply *never asked* by Petitioner's

counsel whether she or a family member had been involved in a traffic accident, and if she had been asked, would not have been struck for cause. *See* Point V.B *infra*. In contrast to *Boney*, there was no statutory disqualification here that would have "guaranteed [Ms. Whipple's] removal from the panel." 68 F.3d at 502-03. As *Boney* acknowledges, "it is expected that a jurors will bring their life experiences into the jury room," as Ms. Whipple did here. *Id.* Further, in *Boney*, the juror's undisputed lie about his felon status "'raise[d] at least the inference that a juror had an undue desire to participate in a specific case, perhaps because of partiality.'" *Boney*, 68 F.3d at 501 (citation omitted). No similar inference as to Ms. Whipple is rationally sustainable here on the basis of her alleged statements during deliberations regarding her daughter's car accident. Contrary to Petitioner's contentions, *Boney* in no way supports the application of the Rule 606(b)(2)(A) exception in this case.

II. THE LEGISLATIVE HISTORY OF RULE 606(b) AND THE RULE'S COMMON LAW PREDECESSORS SUPPORT THE EXCLUSION OF JUROR TITUS'S AFFIDAVIT

Petitioner attempts to circumvent the plain language of Rule 606(b) by erroneously invoking legislative history and common law, to argue that the Rule is narrowly limited to the use of evidence of jury deliberations to explore the *manner* in which a jury reached its verdict (Pet.Br.14,29-32) or the use of evidence as to matters during deliberations that "inhere" in the verdict. (Pet.Br.25,29,34.) In attempting to graft these restrictions onto Rule 606(b), Petitioner contends that the Rule is unconcerned with

Petitioner's proposed use of Juror Titus's statements regarding deliberations to show Ms. Whipple's purported dishonesty during *voir dire*. (Pet.Br.14,29.) In fact, Rule 606(b) was carefully drafted to exclude broad categories of evidence that clearly include Juror Titus's statements in his affidavit. Moreover, nothing in the Rule itself or its legislative history supports Petitioner's contentions that the Rule should be read to preclude the use of such evidence only to challenge the *manner* in which a jury reached its verdict or that the Rule does not reach use of such evidence to challenge a verdict based on purported juror dishonesty during *voir dire*. Indeed, the legislative history directly contradicts Petitioner's arguments.

Contrary to Petitioner's assertion (Pet.Br.30), this Court's statement in *Tanner* that Rule 606(b) is "grounded in the common-law rule against admission of jury testimony to impeach a verdict," 483 U.S. at 121, is not a license for parties to scavenge through the common law for authority that would expand the permissible use of juror testimony beyond the plain language of Rule 606(b). Indeed, as this Court stated in *Tanner*, the common-law rule in which Rule 606(b) was rooted "*flatly* prohibited the admission of juror testimony to impeach a jury verdict," and "[e]xceptions to the common-law rule were recognized *only* in situations in which an 'extraneous influence' was alleged to have affected the jury." *Id.* at 117 (emphasis added) (citation omitted).

Rule 606(b) went through drafts which diverged substantially in the scope of the exclusion. *See* 1969 Advisory Committee Notes on Rules of Evidence, 46 F.R.D. 161, 290-91 (1969); 120 Cong. Rec. H551

(daily ed. Feb. 6, 1974) (Rep. Hungate). As this Court stated in *Tanner*, "the legislative history demonstrates with uncommon clarity that Congress specifically understood, considered, and rejected a version of Rule 606(b) that would have allowed jurors to testify on juror conduct during deliberations "' *Tanner*, 483 U.S. at 125.

The rejected version of Rule 606(b), which had been adopted by the U.S. House of Representatives, excluded only juror testimony, affidavits and statements about "the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith." 46 F.R.D. at 289-90; *see also Tanner*, 483 U.S. at 123 (citing H.R. 5463, 93d Cong., 2d Sess. (1974). This version would have admitted evidence of "irregularities which occur in the jury room" if the testimony related to "the existence of conditions or occurrences of events calculated improperly to influence the verdict." 46 F.R.D. at 291. Jurors were to be allowed to testify "as to matters *other than their own inner reactions.*" *Id.* (emphasis added).

The House version of the Rule was rejected by the U.S. Senate because its "extension of the ability to impeach a verdict [wa]s felt to be unwarranted and ill-advised." S. Rep. No. 93-1277, at 13 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7051, 7060 (quoted in *Tanner*, 483 U.S. at 124); *see also id.* (expressing concern that the House's version "would have the effect of opening verdicts up to challenge on the basis of what happened during the jury's internal deliberations. Permitting an individual to attack a jury

verdict based upon the jury's internal deliberations has long been recognized as unwise by the Supreme Court." (citing *McDonald*, 238 U.S. at 267)). This concern was reiterated by the U.S. Department of Justice, which expressed the view that that "[i]nquiry into *all internal matters*, as distinguished from external influences, should continue to be forbidden, in the interest of protecting the jury system." Hearings Before the Comm. on the Judiciary on Federal Rules of Evidence, H.R. 5463, A Bill to Establish Rules of Evidence for Certain Courts and Proceedings, 93d Cong., at 110, 2d Sess. (1974) (statement of W. Vincent Rakestraw, Assistant Att'y Gen. of the U.S.) (emphasis added). *See also* S. Rep. No. 93-1277, at 14 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7051, 7060 ("In the interest of protecting the jury system and the citizens who make it work, rule 606 should not permit any inquiry into the internal deliberations of the jurors." (quoted in *Tanner*, 483 U.S. at 124-25)).

The version ultimately adopted by Congress was chosen because it categorically prohibited inquiries into jury deliberations and "reflected a conscious, deliberate choice on the part of the Advisory Committee, the Supreme Court, and Congress to limit the scope of post-trial attacks upon verdicts." *State v. Finney*, 337 N.W.2d 167, 170 (S.D. 1983) (Wollman, J., concurring). Accordingly, the Advisory Committee's final draft of the Rule included not only the prohibition on juror testimony regarding the jurors' mental operations and emotional reactions, but also a broad prohibition on evidence of "any statement made or incident that occurred during the jury's deliberations." Fed. R. Evid. 606(b)(1); *see also* 56

F.R.D. 183, 184, 265 (1972). This version was intended to embody those "federal decisions [where] the central focus has been upon insulation of the manner in which the jury reached its verdict, and this protection extends to *each of the components of deliberation, including arguments, statements, discussions, mental and emotional reactions, votes, and any other feature of the process.*" 56 F.R.D. at 266 (emphasis added).

Petitioner erroneously cites the above quoted statement to show that the drafters of the rule were concerned only with challenges to "the *manner*" in which the jury reached its verdict. (Pet.Br.32-33; *see also id.* at 14.) To the contrary, this statement addresses the types of evidence that are excluded under the Rule, not the grounds for the challenge to the validity of the verdict. As the above-quoted statement indicates, Rule 606(b) broadly protects every "component" of the jury's deliberations if introduction of that evidence is sought for the purpose of challenging the verdict.

The listing of types of excluded evidence in Rule 606(b) and the reference in the legislative history to the "components" of the deliberations that are subject to exclusion have nothing to do with the types of *challenges* to the validity of a verdict that are covered by the Rule. That issue is addressed by the language in the Rule indicating that it applies "[d]uring an inquiry into the validity of a verdict or indictment." Fed. R. Evid. 606(b)(1). This broad, general language does not support Petitioner's attempts to limit the Rule to inquiries into the "manner" in which a jury arrived at its verdict and to remove from the reach of the Rule inquiries into the

validity of the verdict based on juror dishonesty in *voir dire*. As the Advisory Committee notes state, the Rule does not limit its application to specific "substantive grounds" for setting aside a verdict. *See* 56 F.R.D. at 266.

Petitioner incorrectly claims that there is no indication in the legislative history that "Rule 606(b)'s drafters intended to broaden the common-law rule to bar the admission of testimony tending to show juror dishonesty during voir dire" and that "[t]o the contrary, the drafters appear to have assumed that Rule 606(b), like its common-law predecessor, would bar only the use of juror testimony to challenge how the verdict was reached." (Pet.Br.30.) This argument assumes that there was an established common-law rule that juror testimony was permissible to overturn a verdict based on a juror's dishonesty at *voir dire*. In fact, as Petitioner's Amici Curiae Professors of Law acknowledge, the common "law on this question is by no means uniform," and while some jurisdictions traditionally allowed juror testimony on that issue, others did not. (*See* Br. Amici Curiae Law Professors at 23-24.)

In claiming that there is an established common-law principle that should be incorporated under Rule 606(b) to allow the use of juror testimony to show a juror's dishonesty on *voir dire*, Petitioner relies primarily on this Court's opinion in *Clark v. United States*, 289 U.S. 1 (1933), which he asserts "reflect[s]" that "common-law principle." (Pet.Br.13-14,20,30,34.) *Clark*, however, involved a criminal contempt proceeding against a juror who had given deliberately false and misleading answers to questions on *voir dire*, not an attempt to vacate a ver-

dict.[5] *See* 289 U.S. at 18. *Clark* addressed the applicability of the common law privilege shielding matters discussed in the jury room, *id.* at 12-19, which this Court specifically distinguished from the rule that the testimony of a juror is not admissible to impeach the verdict. *See id.* at 18. Indeed, as the Court stated, the common-law rule prohibiting the use of juror testimony to impeach a verdict was "wholly unrelated to the problem" before the Court in *Clark*. *Id.* Moreover, in the underlying mail fraud case in *Clark*, "there was no verdict, and hence none to be impeached" (*id.*), because the jury did not reach a verdict, the juror in contempt having cast the single vote for acquittal.[6] *Id.* at 9. Accordingly, as the Tenth Circuit stated in *Benally*, *Clark* allows use of juror testimony to show dishonesty during *voir dire* for purposes of contempt proceedings. *Benally*, 546 F.3d at 1235. Yet, "it does not follow" from *Clark* "that juror testimony that shows a failure to answer honestly during voir dire can be used to overturn the verdict." *Id.* In short, *Clark* does not provide the claimed foundation for Petitioner's ar-

---

[5] This Court had recognized even before *Clark* that jurors could be witnesses in criminal cases or in contempt proceedings against another juror, as in such cases a private party is not seeking to use a juror as a witness to impeach the verdict. *See McDonald*, 238 U.S. at 269.

[6] In any case, as this Court explained, "what happened in the jury room" in *Clark* "added so little to the case that the error, if there had been any, in permitting it to be proved, would have to be regarded as unsubstantial and without effect on the result." *Clark*, 289 U.S. at 18.

gument that Rule 606(b) is inapplicable to challenges to a verdict based upon juror dishonesty.

Petitioner's contention that Rule 606(b) should be read to incorporate the common-law distinction between evidence of matters that "inhere" in the verdict and matters that do not is also without merit. (Pet.Br.34.) Petitioner asserts that "[c]onspicuously absent from the debate leading up to the adoption of Rule 606(b) is any suggestion that the rule altered the common-law rule's general focus on matters that 'inhere in the verdict itself' " (*Id.* (citation omitted).) To the contrary, Rule 606(b) makes clear the broad sweep of the exclusion. It excludes evidence of every "statement made or incident that occur[s] during the jury's deliberations." Fed. R. Evid. 606(b)(1). This clear and categorical language may not be read to mean only "statements made during deliberations that inhere in the verdict" or only "incidents that occurred during deliberations and inhere in the verdict" (whatever an incident inhering in the verdict might be).

Moreover, despite Petitioner's extensive reliance on the common law, Petitioner cites no judicial decision supporting his contention that the Federal Rules of Evidence should be read to incorporate the common law unless they specifically "abrogate" the relevant common law principles. (Pet.Br.34.) In fact, this Court has stated that, although the common law of evidence may "serve as an aid to their application," "the Rules [of Evidence] *occupy the field*." *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 587-88 (1993) (emphasis added). Furthermore, like other canons of statutory interpretation, the presumption favoring the retention of common

law principles is merely a rule of thumb that "give[s] way" when (as here) the statutory language is unambiguous. *Sebelius v. Cloer*, 133 S. Ct. 1886, 1895-96 (2013). Thus, the interpretive principle espoused by Petitioner is not applicable.

Here, Congress and the Advisory Committee considered different draft language for Rule 606(b) and chose the final version after careful analysis. There is no indication in the legislative history that the words of Rule 606(b) may be ignored in favor of common law principles not reflected in the language of the Rule itself, as Petitioner urges. As the Tenth Circuit stated in *Benally*, 546 F.3d at 1239, "[c]ourts no longer have common law authority to fashion and refashion rules of evidence as the justice of the case seems to demand, but must enforce the rules as enacted."

III. THE POLICY CONCERNS IDENTIFIED BY THIS COURT IN *TANNER* SUPPORT THE EXCLUSION OF JUROR TESTIMONY REGARDING DELIBERATIONS IN CHALLENGES TO A VERDICT BASED ON ALLEGED DISHONESTY IN *VOIR DIRE*

This Court has acknowledged the "[s]ubstantial policy considerations" and "weighty government interest in insulating the jury's deliberative process" that underlie Rule 606(b). *Tanner*, 483 U.S. at 119-20. The Rule protects the proper functioning of the jury system and shields jurors from harassment. As this Court has stated, "full and frank discussion in the jury room, the jurors' willingness to return an unpopular verdict, and the community's trust in a system that relies on the decisions of laypeople

would all be undermined by a barrage of postverdict scrutiny of juror conduct." *Id.* at 120-21.

This Court pointed out that these concerns are also reflected in the legislative history, which makes clear that the Rule was broadly drafted to avoid "'opening verdicts up to challenge on the basis of what happened during the jury's internal deliberations, for example, where a juror alleged that the jury refused to follow the trial judge's instructions or that some of the jurors did not take part in deliberations'" and to prevent "'harassment of former jurors by losing parties as well as the possible exploitation of disgruntled or otherwise badly-motivated ex-jurors.'" *Id.* at 124 (quoting S. Rep. No. 93-1277, at 13-14 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7051, 7060).

This Court and other courts have expressed such concerns repeatedly in resolving issues regarding the permissibility of juror testimony concerning deliberations. In its oft-quoted decision in *McDonald v. Pless*, this Court stated:

> [L]et it once be established that verdicts solemnly made and publicly returned into court can be attacked and set aside on the testimony of those who took part in their publication and all verdicts could be, and many would be, followed by an inquiry in the hope of discovering something which might invalidate the finding. Jurors would be harassed and beset by the defeated party in an effort to secure from them evidence of facts which might establish misconduct sufficient to set aside

> a verdict. If evidence thus secured could be thus used, the result would be to make what was intended to be a private deliberation, the constant subject of public investigation; to the destruction of all frankness and freedom of discussion and conference.

238 U.S. at 267-68; *see also Clark*, 289 U.S. at 13 ("[f]reedom of debate might be stifled and independence of thought checked if jurors were made to feel that their arguments and ballots were to be freely published to the world").

These policy concerns of "freedom of deliberation, finality of verdicts, and protection of jurors against harassment by dissatisfied litigants"[7] are equally applicable in the context of the use of juror testimony regarding statements in deliberations to show juror dishonesty at *voir dire*. As the Third Circuit stated, allowing juror testimony in order to show juror dishonesty on *voir dire* "may be thought to create the potential for the very sort of problems that the 'no impeachment' rule is designed to prevent, including in particular the post-trial harassment of jurors in the hope that one will recount a remark by a fellow juror that can be construed as evidence that this juror lied during voir dire." *Williams*, 343 F.3d at 236-37.

---

[7] *Tanner*, 483 U.S. at 137 (Marshall, J., joined by Brennan, Blackmun, and Stevens, JJ., concurring in part and dissenting in part).

Moreover, the potential for numerous challenges to verdicts based on a juror's answers at *voir dire* is exacerbated because the questions put to jurors during *voir dire* typically include broad, general questions as to the jurors' ability to be impartial and follow the court's directions, as they did in this case. If the losing party's counsel can challenge a juror's honesty based on answers to such broad and subjective questions and can sift through the jurors' descriptions and impressions of what other jurors said and thought during deliberations, some ground will almost always be found for a challenge. This concern was emphasized by the Tenth Circuit, which refused to permit so "large a loophole" in Rule 606(b), stating: "A broad question during voir dire could then justify the admission of any number of jury statements that would now be re-characterized as challenges to voir dire rather than challenges to the verdict." *Benally*, 546 F.3d at 1236.

Petitioner is dismissive of these concerns, urging that none of the "policy interests" underlying Rule 606(b) would be "disserve[d]" by interpreting Rule 606 to have no application to motions to vacate a verdict based upon purported juror dishonesty during *voir dire*. (Pet.Br.40.) Petitioner also assures the Court that "[j]uror testimony about deliberations is ordinarily *admissible*, except for the purpose of 'inquir[ing] into the validity of a verdict or indictment'" and therefore jurors have no real expectation of privacy. (*Id.* (alteration and emphasis in original).) In fact, there are very limited circumstances in which juror testimony about deliberations will have any relevance or utility, and it is surely very far from an everyday occurrence to introduce testi-

mony by a juror regarding deliberations in an earlier trial.[8] Moreover, although (as Petitioner asserts (*id.* at 40-41)) jurors in high-profile cases sometimes give interviews about their experience, that occurs on their own terms and no juror need do so if he or she wishes not to. Such interviews are simply not equivalent to a juror's being hauled into court to face examination and cross-examination as to what occurred in the jury room during deliberations.

Likewise, Petitioner's assertion (Pet.Br.41) that permitting admission of juror testimony regarding the deliberative process would be no more chilling than the "threat of criminal contempt" is plainly erroneous. Jurors are prosecuted for perjury in *voir dire* in exceptional circumstances, and only if a prosecutor has examined the evidence and made a determination that prosecution is warranted. Permitting counsel for a losing party to summon jurors into court to testify about deliberations is a far different matter, from which (as courts and Congress recognized) jurors and their verdicts should be shielded. In *Tanner*, in setting forth the legislative history of Rule 606(b), this Court quoted the Senate Report's conclusion that

---

[8] Wigmore states that juror communications are "seldom relevant" to another trial, 8 J.H. Wigmore, *Wigmore on Evidence* §2346 & n.3 (McNaughton ed. 1961), but might sometimes be admissible to establish the scope of issues adjudicated in an earlier trial or to establish a malpractice claim against a losing party's attorney. *Id.* §2349 & n.4; §2351(2).

> "[C]ommon fairness requires that absolute privacy be preserved for jurors to engage in the full and free debate necessary to the attainment of just verdicts. Jurors will not be able to function effectively if their deliberations are to be scrutinized in post-trial litigation. In the interest of protecting the jury system and the citizens who make it work, rule 606 should not permit any inquiry into the internal deliberations of the jurors."

Tanner, 483 U.S. at 124-25 (quoting S. Rep. No. 93-1277, at 13-14 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7051, 7060); *see also* Point II *supra*.

Petitioner also claims that the "notion that jurors will be 'harassed and beset by the defeated party'" is "fanciful" (Pet.Br.42), despite the fact that this Court and many other courts, as well as Congress, perceive the possibility of juror harassment as a serious and substantial policy concern. *See Tanner*, 483 U.S. at 119-20 (quoting *McDonald*, 238 U.S. at 269); *id.* at 124-25 (quoting S. Rep. No. 93-1277, at 13-14 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7051, 7060). In fact, this case, with Petitioner's unfounded accusations of dishonesty by Juror Whipple (*see* Point V.A *infra*), amply demonstrates the need to shield jurors from this kind of inquiry into their deliberations.

Furthermore, the ease with which attorneys could find or invent grounds to challenge verdicts if evidence of jury deliberations were admissible weighs heavily against allowing the use of juror testimony and affidavits to challenge verdicts, including challenges based on purported juror dishonesty in *voir dire*. As a leading treatise states, "in the heat of ju-

ror debate all kinds of statements may be made that have little effect on outcome, though taken out of context they seem damning." 3 J. Weinstein & M. Berger, *Weinstein's Federal Evidence*, §606.04 (1997); *see also* 120 Cong. Rec. H551 (daily ed. Feb. 6, 1974) (Rep. Wiggins) ("Given the length and relative complexity of most jury instructions, the attorney would have no difficulty, after a post trial examination of jurors, in establishing allegations that particular instructions were misunderstood or misapplied by the jury. Thus, the essential goal of finality of decision would be further endangered, even in the realm of civil law. Such an increase in petitions would also serve to overburden even more heavily an already floundering court system." (quoted in 27 Charles Wright & Victor Gold, *Federal Practice & Procedure* §6071, at 440 n.49 (2007)).

Central to this Court's balancing of individual and systemic concerns is the recognition that "jury perfection is an untenable goal." *Benally*, 546 F.3d at 1240. As this Court has long held, a litigant "'"is entitled to a fair trial but not a perfect one," for there are no perfect trials.'" *McDonough*, 464 U.S. at 553 (citation omitted). Accordingly, in *Tanner*, despite acknowledging that investigations into juror misconduct might "in some instances lead to the invalidation of verdicts reached after irresponsible or improper juror behavior," the Court determined that the "substantial" policy goals served by Rule 606(b) outweighed any individual interests that might be advanced by permitting attacks on verdicts based upon evidence of jury deliberations. *Tanner*, 483 U.S. at 119–21. As the Court stated

> It is not at all clear, however, that the jury system could survive such efforts to perfect it. Allegations of juror misconduct, incompetency, or inattentiveness, raised for the first time days, weeks, or months after the verdict, seriously disrupt the finality of the process.

Id. at 120 (citations omitted). These significant policy concerns warrant affirmance of the Eighth Circuit's decision in this case.

IV. THE PRINCIPLE OF CONSTITUTIONAL AVOIDANCE DOES NOT REQUIRE OR SUPPORT HOLDING THAT JUROR STATEMENTS MADE DURING DELIBERATIONS CAN BE USED TO CHALLENGE A JUROR'S HONESTY ON *VOIR DIRE*

Citing the doctrine of constitutional avoidance, Petitioner argues that this Court should avoid construing Rule 606(b)(1) to bar the use of juror testimony or affidavits regarding what occurred during deliberations for the purpose of showing that a juror was dishonest during *voir dire*. According to Petitioner, such an interpretation of the Rule "'would raise a multitude of constitutional problems,'" if not in this case, then in others. (Pet.Br.37-40 (citation omitted).)

The doctrine of constitutional avoidance is not properly invoked in this case. In construing a statute or rule, that doctrine "is a tool for choosing between competing plausible interpretations" of the text at issue, "resting on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts." *Clark v. Mar-*

tinez, 543 U.S. 371, 381 (2005); *see also Sebelius*, 133 S.Ct. at 1895-96 (2013) (canons of statutory interpretation are rules of thumb that come into play only to the extent a statute is ambiguous).

Here there is only one plausible interpretation of Rule 606(b). The Rule categorically prohibits use of juror testimony regarding any statement made or incident that occurred during the jury's deliberations. *See* Fed. R. Evid. 606(b)(1); Point I.A *supra*. The Rule contains specific exceptions, none of which apply here. *See* Point I.B *supra*. Thus, there is no ambiguity in this case: Rule 606(b)(1)'s plain language, legislative history, and policy considerations all unequivocally establish that Rule 606(b)(1) applies to bar Petitioner's use of Juror Titus's affidavit regarding Ms. Whipple's statements during deliberations. There is no plausible alternative interpretation of the words of the Rule that would allow admission of Juror Titus's affidavit. Accordingly, the canon of constitutional avoidance is inapplicable, and the "'judicial inquiry is complete.'" *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992) (citation omitted).

Furthermore, this Court's precedents establish that prohibition of juror testimony regarding matters discussed and things said during deliberations is not unconstitutional. As Petitioner notes, *voir dire* "plays a 'critical' role in safeguarding the constitutional right to an impartial jury." (Pet.Br.38 (citing *Rosales-Lopez*, 451 U.S. at 188).) *Rosales-Lopez*, however, addressed the issue of whether in conducting *voir dire* a court must make an inquiry into racial prejudice when requested by the defendant. It did not address whether juror testimony regarding

deliberations was admissible to show a juror's dishonesty at *voir dire*.

In the context of Rule 606(b), this Court has emphasized that there are multiple "sources of protection" for a litigant's right to a competent and unimpaired jury that are part of the different aspects of the trial process. *Tanner*, 483 U.S. at 127. Those protections include not only *voir dire*, but also observation of the jury during trial by the court, court personnel, and counsel, reports by jurors of inappropriate behavior *before* rendering a verdict, and post-verdict impeachment by evidence other than juror testimony. *Id.* The Court viewed these protections as sufficient constitutionally, without creating further exceptions to Rule 606(b). *Id.* As the Third Circuit stated, this Court's decision in *Tanner* "strongly suggests" that, in light of these sources of protection, "the exclusion of evidence of juror misconduct pursuant to the traditional 'no impeachment' rule is constitutional because of the important purposes that the rule has long been recognized as serving." *Williams*, 343 F.3d at 230; *see also id.* at 235 (this Court's "decision in *Tanner* implies that the Constitution does not require the admission of evidence that falls within Rule 606(b)'s prohibition"); *Benally*, 546 F.3d at 1239 (stating that this Court in *Tanner* "rejected the defendant's argument that his Sixth Amendment right to trial by a competent jury required the admission of evidence otherwise inadmissible under Rule 606(b)").

Petitioner argues that "voir dire can protect the underlying right to an impartial jury only if the questions are sufficient to expose the biases of prospective jurors." (Pet.Br.38.) However, the burden

is squarely on counsel to ask sufficient questions. *See infra* at 50-51. Where, as here, a party's counsel has had the opportunity to ask for the information he now claims should have been volunteered, there is no constitutional infirmity in applying Rule 606(b) to bar use of juror testimony regarding statements made in deliberations.

As the Third Circuit has stated, *Tanner* "surely defeats any argument that it is 'clearly established' in Supreme Court jurisprudence that the Constitution mandates the admission of such evidence." *Williams*, 343 F.3d at 235. Other courts have also consistently "'upheld application of the Rule 606(b) standards of exclusion of juror testimony even in the face of Sixth Amendment fair jury arguments.'" *Benally*, 546 F.3d at 1239 (citation omitted); *see also Braley v. Shillinger*, 902 F.2d 20, 22 (10th Cir. 1990); *Johnson v. Hunter*, 144 F.2d 565 (10th Cir. 1944) (Constitution did not require court to admit black juror's testimony that he was intimidated by the other eleven white jurors, even though proof of that fact would require new trial and proof would be impossible without juror testimony). Accordingly, the doctrine of constitutional avoidance has no role in the Court's resolution of the issues presented by this case.

V. PETITIONER HAS NOT SATISFIED THE *MCDONOUGH* REQUIREMENTS FOR A NEW TRIAL BASED UPON JUROR DISHONESTY DURING *VOIR DIRE*

Although *McDonough* does not support Petitioner's arguments on the admissibility of evidence of jury deliberations in support of a motion for a new trial

(*see supra* at 16-17, 21-22), it would govern what requirements Petitioner must meet to obtain a new trial if such evidence were admissible. In *McDonough*, this Court established two requirements for a new trial based upon juror dishonesty during *voir dire*. *See* 464 U.S. at 556. The Court held that "to obtain a new trial in such a situation, a party must first demonstrate that a juror failed to answer honestly a material question on *voir dire*, and then further show that a correct response would have provided a valid basis for a challenge for cause." *Id.* Here, neither requirement is satisfied.

A. Petitioner Has Not Shown That Juror Whipple Answered Any Question Dishonestly

The *McDonough* test is "directed at intentionally incorrect responses" and is not met "where a 'juror's answer (or non-answer), although mistaken, was not dishonest.'" *United States v. Brooks*, 727 F.3d 1291, 1307 (10th Cir.) (citation omitted), *cert. denied*, 134 S. Ct. 835 (2013). Consistent with this requirement, where a party's attorney fails to ask questions on *voir dire*, the party may not later claim that a juror was dishonest because the juror failed to disclose information that was never requested. As the Eleventh Circuit has stated, "we cannot put upon the jury the duty to respond to questions not posed." *United States v. Kerr*, 778 F.2d 690, 694 (11th Cir. 1985).

Here, Petitioner does not and cannot point to a specific material question actually asked on *voir dire* that Ms. Whipple answered dishonestly. Ms. Whipple was ***never*** asked at *voir dire* whether she or a family member had been involved in a car accident

resulting in injury or death. The other jurors were never asked that question either. Had that question been posed, Petitioner's attorney could have asked Ms. Whipple further questions to explore any potential bias. In the absence of such questioning, the fact that Ms. Whipple made no mention of her daughter's accident does not form a basis for vacating the judgment and granting a new trial.

His counsel having neglected to ask a specific question about the prospective jurors' experience with car accidents, Petitioner attempts to find dishonesty in Ms. Whipple's general statement that she could be impartial and in her having "indicated" that she could award damages to petitioner for future medical expenses and pain and suffering if the evidence supported it. (Pet.Br.2-3.) However, nothing in Mr. Titus's affidavit tends to show Ms. Whipple was dishonest in expressing her belief that she could be impartial. Moreover, the questions put by Petitioner's counsel during *voir dire* regarding "future medical expenses" and "pain and suffering" were questions specifically directed to the jurors' attitudes towards these particular categories of damages and had nothing to do with the jurors' attitudes toward questions of liability.[9] Ms. Whipple's answers to those ques-

---

[9] Petitioner's counsel prefaced these questions with the statements: "Now I am going to go to the injuries" and "fair compensation" (J.A.79); "There are certain things we are going to ask as damages. I am going to ask if anybody has any problem with it. One is medical expenses . . . Then there's future prosthetics" and "allowing a number for pain and suffering." (J.A.80-81). Petitioner's counsel made clear he was asking the jurors if they were comfortable with such kinds of damages, assuming the jury found liability and assuming he proved

tions have nothing to do with her supposed bias against persons injured in traffic accidents.

In this case, the prospective jurors were questioned by both the court and the lawyers for the parties. Petitioner's trial counsel asked both general, subjective questions as to jurors' ability to be impartial and to follow the trial court's instructions and numerous specific questions as to the jurors' experiences. *See supra* at 4-5. Some of the jurors volunteered information about accidents they had had in the course of answering other specific questions.[10] There is no ev-

---

damages. (*E.g.*, J.A.84 ("Mr. Zandstra, are you comfortable with future medical expenses even though it's a substantial number if we prove it?"))

[10] For example, in response to a question about how he felt about lawsuits, one prospective juror, Barton Goodwin, in answering that he "fe[lt] it should be resolved outside of court," disclosed that he had been in a car accident as a passenger. (J.A.64.) Petitioner's rendition incorrectly suggests that Mr. Goodwin volunteered that information in response to a general question about his "ability to remain fair and impartial" (Pet.Br.7), rather than to a specific question about his attitude to lawsuits. Later, in answer to specific follow-up questions from Respondent's counsel, Mr. Goodwin acknowledged that he would be "willing to give Mr. Warger money whether he proves his case or not." (J.A.118.) Likewise, prospective juror Johnnie Knapp revealed that he was in a truck hit by a motorcyclist not in response to the question "Have you had a motorcycle accident?" or "Can you be impartial?" but in response to a question about his attitude towards lawsuits. (J.A.68.) Similarly, prospective juror Boje revealed the motorcycle accidents her family members had had in direct response to a series of questions beginning with "Do you ride motorcycle?" (J.A.72-73.) Prospective juror Abdo, also referenced by Petitioner (Pet.Br.7-8), did not *volunteer* that she "always would have sympathy" for Petitioner and would not be fair to Respondent, but answered spe-

idence, either from the jury deliberations or otherwise, that Ms. Whipple intentionally lied or withheld information she understood to be called for when she did not volunteer information about her daughter's automobile accident.

Courts have been unanimous in rejecting challenges to a juror's honesty on *voir dire* based on a juror's failure to volunteer information not specifically requested. As the Tenth Circuit stated in *Brooks*, "[a]lthough [juror] could have volunteered additional information in response to the questions posed during voir dire, this is not the test for determining whether a juror can be fair and impartial." 727 F.3d at 1308; *see also Fields v. Brown*, 503 F.3d 755, 767 (9th Cir. 2007) (juror "did not fail to volunteer details for any reason that implicated impartiality; he would have furnished them, if asked. But he wasn't asked, and in these circumstances we heed *McDonough*'s admonition not to invalidate the result of a trial."); *Gardner v. Ozmint*, 511 F.3d 420, 424 (4th Cir. 2007) (*McDonough* requirement that "'a juror failed to answer honestly a material question'" was not satisfied where "defense counsel could have questioned the juror about the impact of violent crimes on her life, but did not do so"; juror's failure to volunteer information about her son's death not a dishonest answer (citation omitted)); *United States v. Estey*, 595 F.3d 836, 841 (8th Cir. 2010) (*McDonough* not satisfied where defendant was "accusing the juror of lying in response to a question that was not

---

cific questions put by Respondent's counsel on the subject of sympathy. (J.A.146.)

asked"). Nor is a party entitled to a new trial "when any problem with a juror's answer during voir dire was caused by the poor quality of the question asked." *Estey*, 595 F.3d at 841.

In *Rosales-Lopez v. United States*, 451 U.S. 182 (1981), cited by Petitioner for the "'critical' role" of *voir dire* "in safeguarding the constitutional right to an impartial jury" (Pet.Br.38), this Court indicated that a defendant who wants the jurors questioned regarding possible racial bias must ask the court for such questioning. *See* 451 U.S. at 191-92. This Court's opinions in *Turner v. Murray* and *Ham v. South Carolina*, also cited by Petitioner, impose the same obligation on defendants. *See Turner*, 476 U.S. 28, 37 (1986) ("[A] defendant cannot complain of a judge's failure to question the venire on racial prejudice unless the defendant has specifically requested such an inquiry."); *Ham*, 409 U.S. 524, 529 (1973) (reversing judgment "[b]ecause of the trial court's refusal to make any inquiry as to racial bias of the prospective jurors *after petitioner's timely request therefor*" (emphasis added)).

In short, "[i]t is the role of voir dire to ferret out" such facts as Ms. Whipple's having a close family member who had an arguably relevant experience and "to develop the extent to which the juror's ability to be impartial in the particular case is actually, or presumptively, affected." *Fields*, 503 F.3d at 774. Here, Petitioner's trial counsel did not ask whether the prospective jurors, or close relatives or friends, had been involved in a car accident that resulted in injury or death. Petitioner has not "demonstrate[d] that a juror failed to answer honestly a material

question on *voir dire*," as required for a new trial under *McDonough*. *See* 464 U.S. at 556.

Furthermore, contrary to Petitioner's contentions, no "dishonesty" is established by Juror Whipple's answering "yes" to the question whether she could be impartial and follow the court's instructions. As this Court explained over a century ago, "[b]ias or prejudice is such an elusive condition of the mind that it is most difficult, if not impossible, to always recognize its existence." *Crawford v. United States*, 212 U.S. 183, 196 (1909). Thus, a juror "'may be unaware'" of his own bias, *McDonough*, 464 U.S. at 558 (Brennan, J., concurring) (citation omitted), and "it is often only through more specific questions that a person's prejudices are revealed." *Boney*, 68 F.3d at 502. Accordingly, in criminal cases, "when courts routinely ask prospective jurors whether they or any members of their families have ever been the victim of, a witness to, or charged with a crime, the question is intended to locate prejudices that might be unknown to the jurors themselves." *Id.*

In sum, Petitioner's counsel failed to ask any of the prospective jurors, including Ms. Whipple, whether they or a family member had been in a car accident resulting in injury or death. There is no evidence whatsoever that, in failing to volunteer information about her daughter's accident, Ms. Whipple intentionally concealed information or that she was aware of any bias or that she was dishonest in stating she could be impartial. Accordingly, the first prong of the *McDonough* test is not met, and Petitioner's allegations that Ms. Whipple was dishonest on *voir dire* do not entitle him to a new trial.

B. Petitioner Has Not Met the Second *McDonough* Requirement

Petitioner also fails to meet the second *McDonough* requirement that correct answers by the juror would have provided a basis for a challenge for cause. *See McDonough*, 464 U.S. at 556. This second prong "requires a showing of actual bias." *United States v. Valencia-Trujillo*, 380 F App'x 936, 937 (2010) (citing, *inter alia*, *BankAtlantic v. Blythe Eastman Paine Webber, Inc.*, 955 F.2d 1467, 1473 (11th Cir. 1992). The party raising the challenge "is required to demonstrate an actual, identifiable prejudice on the part of the juror," *United States v. Tutt*, 704 F.2d 1567, 1569 (11th Cir. 1983), either "by express admission or by proof of specific facts showing such a close connection to the circumstances at hand that bias must be presumed." *BankAtlantic*, 955 F.2d at 1473 (citation and quotation marks omitted).

The fact that Ms. Whipple's daughter had a car accident and was glad not to have been sued does not give rise to a presumption of actual bias. Factual situations that require dismissing a juror for cause include "a revelation that the juror is an actual employee of the prosecuting agency, that the juror is a close relative of one of the participants in the trial or the criminal transaction, or that the juror was a witness or somehow involved in the criminal transaction." *Smith v. Phillips*, 455 U.S. 209, 222 (1982) (O'Connor, J., concurring). This case does not involve one of those situations. In addition, while "[d]emonstrated bias in the responses to questions on *voir dire* may result in a juror being excused for cause," mere "hints of bias" are not "sufficient to warrant challenge for cause," although they may

"assist parties in exercising their peremptory challenges." *McDonough*, 464 U.S. at 555.

Here, the record shows that Ms. Whipple was at most a candidate for a peremptory challenge. For example, Respondent's counsel here challenged for cause a prospective juror whose husband had died after being run over by a dump truck (J.A.83,108) and who stated on *voir dire* that she "always would have sympathy" for Mr. Warger and that she had already formed "[a] little bit of an opinion" as to who was fault "just from whatever [she] heard" at *voir dire*. (J.A.146-49.) The district court denied the challenge after questioning the prospective juror and receiving her assurances that she would be able to "put aside any thoughts or feelings" that she had developed, would follow the court's instructions, and would wait until hearing all the evidence and deliberating with her fellow jurors before reaching a conclusion. (J.A.150-51.)

Several other jurors expressed views that indicated sympathy one way or the other. Juror Guthrie, for example, when asked his feelings about "future medical expenses," replied: "No. I mean, if it completely wipes him out is it fair? I mean, if it's an accident why should he and his family suffer forever? I don't know what happened." (J.A.84.) Similarly, prospective juror Whitmyre expressed doubt about awarding damages for pain and suffering. (J.A.88 (Q: "Ms. Whitmyre. Now this time you are shaking your head no." A: "No. I just don't see if it was an accident and wasn't something done deliberate you've got to accept some responsibility. I don't feel somebody should have to pay because you just get your life going again. I have had things happen, too.

You bite the bullet and get going again.").) Neither Juror Guthrie nor Ms. Whitmyre were challenged or excused for cause. Mr. Guthrie served on the jury.

In short, Ms. Whipple would not have been automatically dismissed for cause based on her daughter's accident and her feelings about that accident. Significantly, there is no support in Mr. Titus's affidavit or anywhere else in the record for Petitioner's conclusory assertion that Ms. Whipple simply and categorically "was unwilling to award damages to the victim of a traffic accident." (Pet.Br.46-47.) Mr. Titus's affidavit, the sole evidence proffered by Petitioner in support of his claim of juror dishonesty during *voir dire*, does not satisfy Petitioner's burden under *McDonough*.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

Ronald K. Kappelman
Gregory G. Strommen
Cassidy M. Stalley
BANKS, JOHNSON, KAPPELMAN & BECKER, PLLC
P.O. Box 9007
Rapid City, SD 57709
(605) 341-2400

Sheila L. Birnbaum
Counsel of Record
Douglas W. Dunham
Ellen P. Quackenbos
Laurentia C. McKessar
QUINN EMANUEL URQUHART & SULLIVAN, LLP
51 Madison Ave., 22nd Flr.
New York, NY 10010
(212) 849-7000

Counsel for Respondent

August 6, 2014

REPLY BRIEF

No. 13-517

In the Supreme Court of the United States

GREGORY P. WARGER, PETITIONER

v.

RANDY D. SHAUERS

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

STEVEN C. BEARDSLEY
GARY D. JENSEN
BEARDSLEY, JENSEN
& VON WALD, P.L.L.C.
4200 Beach Drive, Suite 3
P.O. Box 9579
Rapid City, SD 57709

KANNON K. SHANMUGAM
Counsel of Record
JAMES M. MCDONALD
MATTHEW B. NICHOLSON
LESLIE COOPER MAHAFFEY
WILLIAMS & CONNOLLY LLP
725 Twelfth Street, N.W.
Washington, DC 20005
(202) 434-5000
kshanmugam@wc.com

TABLE OF CONTENTS

Page

A. An inquiry into juror dishonesty during voir dire does not constitute an 'inquiry into the validity of a verdict' for purposes of Rule 606(b)(1) 3

B. The common law and the drafting history of Rule 606(b) support the conclusion that juror testimony about dishonesty during voir dire is admissible 7

C. Policy considerations support permitting juror testimony to prove dishonesty during voir dire 11

D. The canon of constitutional avoidance requires interpreting Rule 606(b) to permit juror testimony about dishonesty during voir dire 15

E. In the alternative, juror testimony about statements made during deliberations that tend to show dishonesty during voir dire is admissible under Rule 606(b)(2)(A) 16

F. If this Court agrees with petitioner's interpretation of Rule 606(b), it should remand so that the district court can address petitioner's *McDonough* claim in the first instance 18

Appendix A 1a

Appendix B 4a

TABLE OF AUTHORITIES

Cases:

Alabama Fuel & Iron Co. v. *Powaski*, 166 So. 782 (Ala. 1936) 10

Ayrshire Collieries Corp. v. *United States*, 331 U.S. 132 (1947) 6

Clark v. *United States*, 289 U.S. 1 (1933) ..... *passim*

Drury v. *Franke*, 57 S.W.2d 969 (Ky. 1933) 10

Hyman v. *Eames*, 41 F. 676 (C.C.D. Colo. 1890) 11

Irvin v. *Dowd*, 366 U.S. 717 (1961) 6

Page

Cases—continued:

Lowenfield v. *Phelps*, 484 U.S. 231 (1988) 10
Mathisen v. *Norton*,
60 P.2d 1 (Wash. 1936) 10
McDonough Power Equipment, Inc.
v. *Greenwood*, 464 U.S. 548 (1984) ..... *passim*
Metropolitan R.R. v. *Moore*, 121 U.S. 558 (1887) 7
Norwood v. *State*,
58 S.W.2d 100 (Tex. Crim. App. 1933) 10
Payne v. *Burke*, 260 N.Y.S. 259 (App. Div. 1932) 10
Robles v. *Exxon Corp.*, 862 F.2d 1201 (5th Cir. 1989) 5
Rogers v. *United States*, 422 U.S. 35 (1975) 5
Shulinsky v. *Boston & Maine R.R.*,
139 A. 189 (N.H. 1927) 10
Tanner v. *United States*, 483 U.S. 107 (1987) 17
Traver v. *Meshriy*, 627 F.2d 934 (9th Cir. 1980) 5
United States v. *Ailsworth*,
138 F.3d 843 (10th Cir. 1998) 5
United States v. *Benally*,
546 F.3d 1230 (10th Cir. 2008),
cert. denied, 558 U.S. 1051 (2009) 6
United States v. *Boney*,
68 F.3d 497 (D.C. Cir. 1995) 16, 17
United States v. *Ebron*,
683 F.3d 105 (5th Cir. 2012),
cert. denied, 134 S. Ct. 512 (2013) 10
United States v. *Villar*, 586 F.3d 76 (1st Cir. 2009) 15
Wainwright v. *Witt*, 469 U.S. 412 (1985) 20
Williams v. *Price*, 343 F.3d 223 (3d Cir. 2003) 6
Wilson v. *Wiggins*, 94 P.2d 870 (Ariz. 1939) 10

Constitution and rules:

U.S. Const. Amend. VI 12, 15
U.S. Const. Amend. XIV 12
Fed. R. Evid. 606(b) ..... *passim*
Fed. R. Evid. 606(b)(1) ..... *passim*
Fed. R. Evid. 606(b)(2)(A) 16, 17, 18

Page

Miscellaneous:

American Heritage Dictionary of the English Language (4th ed. 2000) 3
Christopher B. Mueller & Laird C. Kirkpatrick, *Federal Evidence* (4th ed. 2013; updated May 2014) 6, 14
Oxford English Dictionary (2d ed. 1989) 3
Webster's Third New International Dictionary of the English Language Unabridged (2002) 3
Charles Alan Wright & Victor James Gold, *Federal Practice and Procedure: Evidence* (2d ed. 2007) 6

In the Supreme Court of the United States

No. 13-517

GREGORY P. WARGER, PETITIONER

v.

RANDY D. SHAUERS

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

Unfortunately for respondent, the weakest point in his argument is the most critical: respondent's position simply cannot be reconciled with the actual language of Federal Rule of Evidence 606(b). In particular, Rule 606(b)(1) permits a juror to testify freely about statements made during deliberations, as long as that testimony is not used "[d]uring an inquiry into the validity of a verdict or indictment." As petitioner has explained, an "inquiry into the validity of a verdict" is an examination of the manner in which the verdict was reached. Because a claim of juror dishonesty during voir dire does not require any such examination, Rule 606(b) permits the introduction of testimony about statements made during deliberations that tend to show the alleged dishonesty.

Rather than confronting the language of Rule 606(b), respondent seeks to rewrite it. Respondent asks this Court to read the rule to exclude testimony that is used to "*challenge*[] * * * the validity of the verdict." Br. 35. But that is not what Rule 606(b) says: it excludes only juror testimony that is used "[d]uring an inquiry into the validity of a verdict." The Court should reject respondent's efforts to give the rule a broader exclusionary scope.

With little to say about the rule's text, respondent heavily relies on the rule's drafting history and various policy considerations. But respondent's arguments about the drafting history are entirely beside the point. The debates concerning the proposed rule focused on the type of evidence that would be excluded (which is not in dispute here), not the type of inquiry during which that evidence would be excluded. As for respondent's policy arguments, they consist of nothing more than a parade of horribles—horribles that have not come to pass in those jurisdictions where juror testimony about deliberations is already admissible to show dishonesty during voir dire on a motion for new trial.

In any event, respondent's policy arguments are insufficient to overcome the countervailing and constitutionally based policy considerations that support petitioner's reading of the rule: specifically, the need to protect a litigant's rights to effective voir dire and to trial by an impartial jury. The Court should interpret Rule 606(b) according to its terms and in a manner that respects those rights. It should therefore reverse the judgment of the court of appeals.

A. An Inquiry Into Juror Dishonesty During Voir Dire Does Not Constitute An 'Inquiry Into The Validity Of A Verdict' For Purposes Of Rule 606(b)(1)

1. As petitioner has explained, the phrase "[d]uring an inquiry into the validity of a verdict" naturally presupposes that the claim for which juror testimony about deliberations is sought to be introduced will require an examination of the manner in which the verdict was reached. Although respondent resists that conclusion, he cannot reconcile his interpretation with the plain language of the rule.

a. By its terms, and subject to certain enumerated exceptions, Rule 606(b) excludes juror testimony about deliberations only where the testimony is sought to be used "[d]uring an *inquiry* into the validity of a verdict or indictment." Fed. R. Evid. 606(b)(1) (emphasis added). An "inquiry," of course, is a "close examination." *American Heritage Dictionary of the English Language* 905 (4th ed. 2000); see, *e.g.*, *Webster's Third New International Dictionary of the English Language Unabridged* 1167 (2002) (defining an "inquiry" as an "examination into facts or principles"); 7 *Oxford English Dictionary* 1010 (2d ed. 1989) (defining an "inquiry" as an "investigation" or "examination").

Respondent does not contend that a claim of juror dishonesty during voir dire requires any examination of the validity of the verdict. Nor could he colorably do so: under *McDonough Power Equipment, Inc.* v. *Greenwood*, 464 U.S. 548 (1984), a court considering such a claim must consider only (1) whether the juror in question failed to answer honestly a material question on voir dire and (2) whether a correct response would have provided a valid basis for a challenge for cause. *Id.* at 556. If the movant establishes both points, he is entitled to relief, regardless of whether the juror's dishonesty affect-

ed the verdict—or whether the jury has even reached a verdict.

In response to this point, respondent simply excises the limiting term "inquiry" from the text of the rule. As respondent would have it, Rule 606(b) excludes all testimony that is used to "*challenge*[] * * * the validity of the verdict." Br. 35; see Br. 12, 13, 20, 22, 24, 32, 38, 39, 42, 44. The United States similarly asserts that Rule 606(b) excludes testimony used to "*impugn*[] the validity of the * * * verdict." Br. 10 (emphasis added). But the exclusion in Rule 606(b)(1) covers only "an inquiry into the validity of a verdict"; it does not extend to any effort to "challenge" or "impugn" the validity of the verdict (even assuming, *arguendo*, that a claim of juror dishonesty during voir dire can be so characterized, see pp. 4-5, 6-7, *infra*).

b. Two other features of the language of Rule 606(b)(1) support petitioner's interpretation. To begin with, the current version of Rule 606(b)(1) excludes evidence only "during" an inquiry into the validity of a verdict; prior versions of the rule similarly excluded evidence "upon" such an inquiry. The rule's use of the word "during" serves to reinforce that the rule is concerned with the substantive "inquiry" mandated by the claim at hand. For its part, the United States acknowledges that "sett[ing] aside the existing verdict" is the "remedy" for a successful *McDonough* claim. Br. 10. But Rule 606(b)(1) requires that the validity of the verdict be put at issue "during" the "inquiry" required by the particular claim—not as the remedy that follows once that inquiry is complete.

In addition, Rule 606(b)(1) excludes evidence only during an inquiry into the "validity of [the] verdict." The phrase "validity of the verdict" is widely understood to refer to whether the verdict was "correct or proper."

Robles v. *Exxon Corp.*, 862 F.2d 1201, 1207-1208 (5th Cir. 1989). Outside the specific context of Rule 606(b)(1), courts have regularly used the phrase to refer to the manner in which the verdict was reached. See, *e.g.*, *Rogers* v. *United States*, 422 U.S. 35, 38 (1975); *United States* v. *Ailsworth*, 138 F.3d 843, 846 (10th Cir. 1998). As then-Judge Kennedy put it, the common-law predecessor to Rule 606(b) "mean[t] particularly that juror affidavits or testimony will not be received concerning the manner in which the jury arrived at its verdict." *Traver* v. *Meshriy*, 627 F.2d 934, 941 (9th Cir. 1980). Exactly so with regard to Rule 606(b) itself: an inquiry into the validity of the verdict is an inquiry into the manner in which the verdict was reached.

2. The nature of a *McDonough* claim further confirms petitioner's interpretation. A *McDonough* claim ripens when the alleged misconduct is complete: that is, when the juror gives a materially dishonest answer and is empaneled on the jury as a result. Accordingly, a litigant may bring a *McDonough* claim whenever the relevant information comes to light—even before the jury has reached a verdict. Respondent does not dispute that juror testimony about statements tending to show dishonesty during voir dire would be admissible before the jury reached a verdict. Given the concededly structural nature of a *McDonough* error, the admissibility of such testimony should not—and by the rule's terms, does not—turn on the happenstance of when the statements came to light.

Notably, in discussing the applicability of Rule 606(b), commentators have stressed the fact that a *McDonough* claim involves misconduct that occurs before the deliberations giving rise to the verdict. The treatise on which the United States principally relies explains that "affidavits or testimony by jurors" would

seemingly be admissible under Rule 606(b) to show "misconduct by jurors occurring *prior to* deliberations"—a category that, according to the treatise, includes "giving false answers on voir dire." 3 Christopher B. Mueller & Laird C. Kirkpatrick, *Federal Evidence* § 6:21 (4th ed. 2013; updated May 2014) (*Federal Evidence*). Similarly, another treatise, in discussing the cases that have adopted petitioner's interpretation, notes that "the focus of [a *McDonough*] motion is the legitimacy of pre-trial procedures, not the validity of the verdict." 27 Charles Alan Wright & Victor James Gold, *Federal Practice and Procedure: Evidence* § 6074, at 516 (2d ed. 2007).

3. In support of their contrary interpretation, respondent and his amici marshal only scant authority.

a. Respondent primarily relies (Br. 17-24) on two court of appeals decisions. But those decisions provide little support for his textual argument. The first, *Williams* v. *Price*, 343 F.3d 223 (3d Cir. 2003), involved a federal habeas petition by a state prisoner; the court held only that the petitioner had failed to show a violation of clearly established federal law, "emphasiz[ing] that [it was] not hold[ing] that testimony of the type at issue is inadmissible under Rule 606(b) or any other particular version of the 'no impeachment' rule." *Id.* at 237. And the second, *United States* v. *Benally*, 546 F.3d 1230 (10th Cir. 2008), cert. denied, 558 U.S. 1051 (2009), while adopting respondent's interpretation, engages in no meaningful analysis of the rule's text.

b. For its part, the United States principally relies (Br. 10) on two of this Court's decisions that characterized "judgments" resulting from improperly constituted tribunals as "void." See *Irvin* v. *Dowd*, 366 U.S. 717, 727-728 (1961); *Ayrshire Collieries Corp.* v. *United States*, 331 U.S. 132, 144 (1947). But those cases have no

bearing on what constitutes "an inquiry into the validity of a verdict"; to say that a *judgment* is *void* is not to say that the underlying *verdict* is *invalid*. The only other case the United States cites, *Metropolitan R.R.* v. *Moore*, 121 U.S. 558, 564 (1887), recognized that jury misconduct might result in setting aside the verdict, but that generic proposition sheds little light on the specific question whether an inquiry into dishonesty during voir dire constitutes an "inquiry into the validity of [the] verdict." It does not, and the court of appeals erred by holding to the contrary.

B. The Common Law And The Drafting History Of Rule 606(b) Support The Conclusion That Juror Testimony About Dishonesty During Voir Dire Is Admissible

Having little to say about the language of Rule 606(b), respondent and his amici seek refuge in the common law and in the rule's drafting history. Compare, *e.g.*, U.S. Br. 9-11 (discussing the text of Rule 606(b)) with *id.* at 12-23 (discussing the common law and drafting history). But neither of those sources supports respondent's atextual interpretation of the rule itself.

1. As respondent acknowledges (Br. 12), the relevant portion of Rule 606(b)(1) contains two discrete requirements for the exclusion of evidence. The first requirement establishes the *type of inquiry* during which evidence will be excluded; the rule applies only "[d]uring an inquiry into the validity of a verdict." Fed. R. Evid. 606(b)(1). The second requirement specifies the *type of evidence* that will be excluded during such an inquiry; the rule covers "any statement made or incident that occurred during the jury's deliberations; the effect of anything on that juror's or another juror's vote; or any juror's mental processes concerning the verdict." *Ibid.*

Evidence will be excluded under Rule 606(b) only if both requirements are satisfied.

Petitioner has never disputed that Stacey Titus's affidavit satisfies the second requirement, because it plainly contains statements that were "made * * * during the jury's deliberations." Instead, petitioner has argued that the affidavit does not satisfy the first requirement, because he is not seeking to use it "[d]uring an inquiry into the validity of [the] verdict." Fed. R. Evid. 606(b). In support of that argument, petitioner has explained that, while there were outlying decisions to the contrary, the prevailing practice at common law was to admit juror testimony to prove dishonesty during voir dire. See Pet. Br. 25-30.

In addition, to show that Rule 606(b) did not alter that common-law practice, petitioner has explained that, although the drafters of Rule 606(b) engaged in vigorous debate regarding the scope of the rule, those debates focused on the type of evidence that would be excluded (what is now the second requirement in Rule 606(b)), not on the type of inquiry during which that evidence would be excluded (what is now the first requirement). The legislative history reveals that Congress debated whether the rule should broadly prohibit *all* evidence concerning a jury's deliberations, or only evidence concerning a juror's own thought processes. But no one seems to have questioned that, whatever the scope of evidence covered by the rule, the covered evidence would be excluded only if it were being used to inquire into the manner in which the jury arrived at its verdict. Indeed, both of the competing versions of the rule contained the "inquiry into the validity of a verdict" language at issue here. See Pet. Br. 30-35.

2. On this subject, respondent and his amici offer a line of argument that is simply nonresponsive. They

contend that the question presented here requires the Court to wade into the common law and drafting history regarding the *type of evidence concerning a jury's deliberations* that is subject to exclusion. The United States sets out two schools of thought on that issue, pitching the "Iowa rule" (which, in its view, prohibited only juror testimony regarding a juror's own thought processes) against the "federal rule" (which prohibited all evidence from deliberations used to impeach a verdict). See Br. 12. The United States goes so far as to label its favored view as the "federal rule," even though it recognizes that this Court twice applied the competing "Iowa rule" instead. See Br. 15-16.

The debate about what type of evidence was excluded at common law (and is excluded by Rule 606(b)) may be an intellectually stimulating one. But it ultimately has nothing to do with the question this case actually presents: *viz.*, whether evidence that is indisputably covered by Rule 606(b)'s second requirement also satisfies the first requirement because it is being used "[d]uring an inquiry into the validity of a verdict." Accordingly, nearly the entirety of respondent's arguments concerning the common law and the drafting history of Rule 606(b) can be brushed aside.

3. On the question of the type of inquiry during which evidence concerning a jury's deliberations will be excluded, respondent and his amici again have little to say.

a. Respondent advances the breathtakingly broad position that the drafting history of Rule 606(b) demonstrates that the rule was intended "categorically [to] prohibit[] inquiries into jury deliberations." Br. 34; see Br. 15, 47. But if this Court were to accept that position, it would not only have to rewrite the language of Rule 606(b); it would have to hold that Rule 606(b) overruled

Clark v. *United States*, 289 U.S. 1 (1933), which permitted the use of juror testimony about deliberations to show dishonesty during voir dire in the context of contempt proceedings, as well as decisions permitting juror testimony about deliberations *before* a verdict has been reached. See, *e.g.*, *Lowenfield* v. *Phelps*, 484 U.S. 231, 234 (1988); *United States* v. *Ebron*, 683 F.3d 105, 125-126 (5th Cir. 2012), cert. denied, 134 S. Ct. 512 (2013).

b. The United States does not dispute that numerous courts at common law—including courts applying both the "Iowa rule" and the "federal rule"—admitted juror testimony to prove dishonesty during voir dire. Instead, it cites seven cases for the proposition that "[c]ommon-law courts that applied the federal rule treated a motion for a new trial based on juror dishonesty during voir dire as an inquiry into the validity of the verdict." Br. 13. Of those cases, however, two actually rejected the government's position here. See *Mathisen* v. *Norton*, 60 P.2d 1, 3-4 (Wash. 1936); *Norwood* v. *State*, 58 S.W.2d 100, 101 (Tex. Crim. App. 1933). Two others, while not expressly rejecting the government's position, do not adopt it. See *Alabama Fuel & Iron Co.* v. *Powaski*, 166 So. 782, 787-788 (Ala. 1936); *Drury* v. *Franke*, 57 S.W.2d 969, 985 (Ky. 1933). And of the three remaining cases, two were decided before *Clark*, and the one that was decided after *Clark* does not even cite it. See *Wilson* v. *Wiggins*, 94 P.2d 870, 871-872 (Ariz. 1939); *Payne* v. *Burke*, 260 N.Y.S. 259, 261-262 (App. Div. 1932); *Shulinsky* v. *Boston & Maine R.R.*, 139 A. 189, 191 (N.H. 1927).

As petitioner has explained, moreover, this Court's decision in *Clark* resolves any doubt about the prevailing practice at common law. While it is true that *Clark* involved a contempt proceeding rather than a post-verdict motion for a new trial, the Court observed that the com-

mon-law rule that "the testimony of a juror is not admissible for the impeachment of his verdict" did not extend to prohibit all testimony that could result in a new trial. 289 U.S. at 18. As one example of testimony that would not be excluded, the Court cited *Hyman* v. *Eames*, 41 F. 676 (C.C.D. Colo. 1890), where, as here, the plaintiff sought a new trial for dishonesty during voir dire based largely on juror testimony about statements made during deliberations. *Id.* at 677. The *Hyman* court explained that "the familiar rule that jurors shall not be allowed to impeach their verdict" did not apply where the court was "considering the competency" of a dishonest juror to "sit as a juror" in the first instance. *Id.* at 677-678. Neither respondent nor the United States offers any response to *Clark*'s approval of the *Hyman* rule. Particularly after *Clark*, the prevailing common-law practice was to admit juror testimony to prove dishonesty during voir dire, and nothing in the drafting history of Rule 606(b) suggests that the rule was intended to disturb that practice.

C. Policy Considerations Support Permitting Juror Testimony To Prove Dishonesty During Voir Dire

Lacking any foothold in the text of Rule 606(b), respondent heavily relies on policy considerations in support of his interpretation. To the extent policy considerations are relevant, however, they support petitioner's interpretation, not respondent's.

1. As a preliminary matter, respondent entirely disregards the constitutional underpinnings of a litigant's right to truthful answers during voir dire. This Court has observed that truthful answers are the "obvious" and "necess[ary]" predicate for voir dire to serve its critical role in safeguarding a litigant's right to trial by an impartial jury. *McDonough*, 464 U.S. at 554. Remarkably,

respondent does not so much as mention the constitutional rights to effective voir dire and to trial by an impartial jury in contending that his favored, and purportedly "all-important," non-constitutional policy considerations should carry the day. See Br. 15. But whatever the policy interests in protecting juror privacy and finality, those interests surely must yield to the interests on the other side of the balance—interests that the Founders enshrined in the jury-trial and due-process provisions of the Constitution.

In support of that proposition, the Court need look no further than its decision in *Clark*. There, the Court acknowledged the "weighty" interest in ensuring that "conduct in the jury room shall be untrammeled by the fear of embarrassing publicity." 289 U.S. at 16. But, the Court concluded, that interest "must yield to the overmastering need, so vital in our polity, of preserving trial by jury in its purity against the inroads of corruption." *Ibid.* The analysis is no different where, as here, the jury ultimately reached a verdict, because the empanelment of a dishonest juror necessarily pollutes the ensuing trial (and resulting verdict).

2. Even taken on their own terms, respondent's policy arguments carry little weight.

a. Respondent contends (Br. 43-44) that permitting juror testimony about deliberations in support of a *McDonough* claim would have a chilling effect on deliberations, even though such testimony is already admissible (and jurors are free to speak about their deliberations) in a range of other contexts. With specific reference to contempt proceedings for dishonesty during voir dire, respondent and his amici assert that jurors are prosecuted for contempt only in "exceptional circumstances," Resp. Br. 43, because the standard in contempt cases is "high," U.S. Br. 25. Contrary to those asser-

tions, however, the *McDonough* standard is just as high as, if not higher than, the contempt standard. Whereas mere dishonesty can serve as the basis for contempt, see *Clark*, 289 U.S. at 11, a *McDonough* claim requires not only that the juror was dishonest but that an honest answer would have supported a valid challenge for cause, see 464 U.S. at 556.

Unsurprisingly, respondent cannot point to any evidence to support his contention that permitting juror testimony about deliberations in support of a *McDonough* claim would have a chilling effect on deliberations. In fact, in those jurisdictions that already permit such testimony, there is no such evidence. As Justice Cardozo memorably put it in *Clark*, "[t]he chance that now and then there may be found some timid soul who will take counsel of his fears and give way to their repressive power is too remote and shadowy to shape the course of justice." 289 U.S. at 16.

b. Respondent also contends (Br. 44) that permitting juror testimony about deliberations in support of a *McDonough* claim would result in the harassment of jurors. Once again, however, there is no evidence that such harassment is a particular problem in jurisdictions that already permit such testimony, and various state laws and ethical rules already exist to prevent such harassment. See Pet. Br. 42-44. Respondent does not contend that those rules have been ineffective in protecting jurors from harassment in jurisdictions that permit such testimony. And to the extent juror harassment is a valid concern—even though juror testimony about deliberations is already admissible in a range of other contexts—the appropriate solution would be to tailor the existing rules to address that problem, not to adopt an atextual interpretation of Rule 606(b) that trenches upon a litigant's constitutional right to trial by an impartial jury.

c. Respondent speculates (Br. 44-45) that permitting juror testimony about deliberations in support of a *McDonough* claim would undermine the finality of verdicts. Once again, however, experience has shown the opposite. For example, in California, which has permitted the introduction of such testimony in state court since 1959, petitioner has found fewer than 50 decisions involving the use of such testimony—less than one per year. See Appendix A, *infra*. And within the Ninth Circuit—the largest circuit to have adopted petitioner's interpretation—petitioner has found only 15 decisions involving the use of such testimony in the nearly three decades that interpretation has been in effect. See Appendix B, *infra*. While the law professors supporting respondent assert that "many defendants," "[e]mboldened by the Ninth Circuit's standard," have "argued that jurors acted 'dishonestly' merely by failing to affirmatively volunteer probative information to defense counsel," they cite only two cases for that proposition—and, in both cases, the Ninth Circuit *rejected* the *McDonough* claim. See Br. 23. There is therefore no evidence that petitioner's interpretation has had a meaningful effect on the finality of verdicts—even assuming, *arguendo*, that the finality of verdicts ranks higher in the hierarchy of policy interests than the impartiality of the juries that reach them.

d. Finally with respect to policy, respondent asserts (Br. 42) that permitting juror testimony about deliberations in support of a *McDonough* claim would create a "loophole" in Rule 606(b) by allowing parties to recast challenges to the verdict as *McDonough* claims. But that concern is unfounded. Precisely because *McDonough* requires material dishonesty during voir dire, *McDonough* claims "seldom succeed." 3 *Federal Evidence* § 6:21. And as noted above, the available evidence

confirms that the floodgates have not opened in jurisdictions where such testimony is already admissible. That speculative policy consideration, and the others identified by respondent, cannot trump the plain language of Rule 606(b) or outweigh the constitutional considerations supporting petitioner's interpretation.

D. The Canon Of Constitutional Avoidance Requires Interpreting Rule 606(b) To Permit Juror Testimony About Dishonesty During Voir Dire

As petitioner has explained, respondent's interpretation of Rule 606(b) raises constitutional concerns—both concerning the right to an impartial jury more generally and the right to a jury free of racial bias—that trigger the canon of constitutional avoidance. See Pet. Br. 37-40. Respondent's primary answer is to assert that his interpretation of the rule is the only plausible one. See Resp. Br. 47. If anything, however, it is *petitioner*'s interpretation that is the only textually plausible one. See pp. 3-7, *supra*.

Respondent contends that lower courts "have * * * consistently upheld application of the Rule 606(b) standards of exclusion of juror testimony even in the face of Sixth Amendment fair jury arguments." Br. 49 (internal quotation marks and citation omitted). But that is incorrect. In *United States* v. *Villar*, 586 F.3d 76 (2009)—like many of the other cases in this area, a criminal case, involving a claim of racial bias, to which the United States was a party—the First Circuit *accepted* such an argument and permitted juror testimony about deliberations on constitutional grounds. *Id.* at 87. This Court can avoid the broader constitutional concerns with barring evidence of juror dishonesty during voir dire only by rejecting respondent's already atextual interpretation of Rule 606(b).

E. In The Alternative, Juror Testimony About Statements Made During Deliberations That Tend To Show Dishonesty During Voir Dire Is Admissible Under Rule 606(b)(2)(A)

Should this Court hold, despite the plain language of Rule 606(b)(1), that evidence tending to show juror dishonesty during voir dire would otherwise be inadmissible under that rule, it should hold that such evidence is admissible under the exception in Rule 606(b)(2)(A) for evidence that "extraneous prejudicial information was improperly brought to the jury's attention." As petitioner has explained, where a juror is empaneled despite concealing information that would have resulted in the juror's being struck for cause, that information is extraneous, prejudicial, and improper. See *United States* v. *Boney*, 68 F.3d 497, 503 (D.C. Cir. 1995).

1. Respondent broadly contends (Br. 25) that the exception in Rule 606(b)(2)(A) "does not extend to a juror's own experiences, knowledge, values, and beliefs." Of course, that is true as a general matter. But information that, if disclosed, would have precluded a juror from serving in the first place is an exception to that general rule. As the D.C. Circuit explained in *Boney*, "[a]lthough it is expected that jurors will bring their various life experiences into the jury room," information that would have precluded a juror from serving "is the one matter that should not [be] before the jury at all" and thus constitutes "extraneous prejudicial information." 68 F.3d at 503.

Respondent attempts to distinguish *Boney* in two ways, but neither is availing. Respondent first asserts that, "unlike the juror in [*Boney*], [Regina] Whipple did not answer falsely in response to questions asked during *voir dire*." Br. 30. But that bald assertion simply assumes the answer to the underlying *McDonough* in-

quiry—an inquiry that, precisely because of the exclusion of Mr. Titus's affidavit, has not yet taken place. Respondent next asserts that this case is different because "there was no statutory disqualification" that prevented Ms. Whipple from serving on the jury. Br. 31. But the rule of *Boney* applies without regard to whether the juror's disqualification arose by operation of statute or from bias that should have resulted in a for-cause dismissal. 68 F.3d at 503.

2. Unlike respondent, the United States makes no effort to reconcile its interpretation with *Boney*. Instead, it asserts that the exception in Rule 606(b)(2)(A) "applies only to particular information *relating to the case* that might affect the verdict." Br. 31 (internal quotation marks and citation omitted). But the language of the rule contains no such limitation. And any such limitation would be at odds with *Boney*, because the "extraneous prejudicial information" at issue there involved a juror's previous felony conviction, which had nothing to do with the case at hand. See 68 F.3d at 503.

The United States also contends (Br. 33) that petitioner's interpretation of Rule 606(b)(2)(A) is foreclosed by this Court's decision in *Tanner* v. *United States*, 483 U.S. 107 (1987). That is a curious contention, because the exception in Rule 606(b)(2)(A) was not even at issue in *Tanner*—not surprisingly, given that the use of drugs and alcohol obviously does not constitute "information." *Id.* at 121-122. As for the government's assertion that Ms. Whipple "was surely no less competent to serve on the jury than were the *Tanner* jurors," Br. 33, that assertion, while debatable, is irrelevant. The salient point for present purposes is that the defendants in *Tanner* could not have argued that the jurors should have been disqualified from the jury in the first place. But that was precisely the case with Ms. Whipple, whose dishonesty

during voir dire rendered her presence on the jury a "sham," *Clark*, 289 U.S. at 11, and thus rendered the information that would have disqualified her from jury service extraneous and impermissible. To the extent Mr. Titus's affidavit was inadmissible under Rule 606(b)(1), therefore, the court of appeals erred by holding that it was also inadmissible under Rule 606(b)(2)(A).

F. If This Court Agrees With Petitioner's Interpretation Of Rule 606(b), It Should Remand So That The District Court Can Address Petitioner's *McDonough* Claim In The First Instance

Finally, respondent argues (Br. 49-58) that, even with Mr. Titus's affidavit, petitioner would not be entitled to a new trial under *McDonough*. That argument is misguided and mistaken.

1. As a preliminary matter, respondent advanced the same argument as a reason why the Court should deny the petition for certiorari, see Br. in Opp. 14-15, 18, yet the Court granted review. Now that this case has reached the merits stage, respondent's argument is of no consequence. The only question before the Court is the threshold legal question whether Rule 606(b) permits the introduction of juror testimony of the type at issue here—not the subsequent fact-bound question whether the testimony in this case, if admitted, would be sufficient to meet the *McDonough* standard. If the Court agrees with petitioner's interpretation of Rule 606(b), it should remand so that the district court can address his underlying *McDonough* claim in the first instance. See *McDonough*, 464 U.S. at 556 (noting that, "[g]enerally, motions for a new trial are committed to the discretion of the district court").

2. In any event, respondent's argument that petitioner would not be entitled to a new trial under *McDon-*

ough lacks merit, because petitioner would readily be able to satisfy both of *McDonough*'s requirements.

a. To begin with, Mr. Titus's affidavit demonstrates that Ms. Whipple failed to answer honestly when she was asked whether there was any reason why she could not remain fair and impartial in a case of this type—and specifically whether she could vote to award damages for pain and suffering or future medical expenses if the evidence supported such an award. As the affidavit explains, Ms. Whipple's own daughter had been at fault in a fatal automobile accident, and Ms. Whipple expressed the belief that, if her daughter had been sued, it would have "ruined her life." Pet. App. 40a. As a result, in Mr. Titus's view, Ms. Whipple was unwilling to follow the "facts, evidence, and law" in deciding whether to impose liability for the horrific accident in which petitioner lost his leg. *Ibid.* Given those statements, it cannot be said that Ms. Whipple was truthful when she indicated that she could remain fair and impartial in a case of this type—or when she affirmatively stated that she could vote to award particular types of damages.

In arguing to the contrary, respondent faults petitioner's counsel for not asking the "specific" question "whether [Ms. Whipple] or a family member had been involved in a car accident resulting in injury or death." Br. 50-51. But however "general" or "specific" the questioning that took place here may have been, cf. *Clark*, 289 U.S. at 8 (affirming a contempt conviction for a juror's dishonest answer to the question whether she "felt that her mind was free from bias"), there can be no reasonable dispute that the questioning should have elicited information about Ms. Whipple's daughter's fatal automobile accident. As respondent acknowledges (Br. 52), no fewer than four prospective jurors disclosed during *voir dire* that they or their family members had been in-

volved in traffic accidents; in each case, those disclosures triggered a series of follow-up questions on the jurors' potential biases. See J.A. 54, 64-65, 68-72, 73-74, 83, 108-111. And most of those follow-up questions occurred *before* Ms. Whipple was asked whether she could remain impartial. See J.A. 105. It thus blinks reality for respondent to suggest that Ms. Whipple was somehow "unaware" that she should have disclosed information about her daughter's own accident. See Br. 55.

In a similar vein, respondent asserts that the questions about damages "had nothing to do with the jurors' attitudes toward questions of *liability*." Br. 51 (emphasis added). As an initial matter, it is doubtful that Ms. Whipple drew such a fine distinction. See *McDonough*, 464 U.S. at 555 (noting that "jurors are not necessarily experts in English usage"). But in any event, such a distinction is beside the point. If Ms. Whipple was *unwilling* to award particular types of damages flowing from a defendant's liability in a traffic accident (on the ground that the award of such damages against her daughter would have "ruined her life"), then Ms. Whipple's affirmative answers that she *could* award those damages were evidently dishonest.

b. In addition, Mr. Titus's affidavit demonstrates that honest answers from Ms. Whipple would have provided a valid basis for a challenge for cause. As noted above, Mr. Titus's affidavit explains that Ms. Whipple's daughter had been at fault in a fatal automobile accident and that Ms. Whipple believed that, if her daughter had been sued, it would have "ruined her life." If Ms. Whipple had disclosed those facts, there would have been far more than a "hint[] of bias" warranting a peremptory challenge, Br. 56; there would have been "[d]emonstrated bias" warranting a challenge for cause. *McDonough*, 464 U.S. at 554; see *Wainwright* v. *Witt*, 469 U.S. 412,

433 (1985) (stating that a juror is biased, and thus removable for cause, if his views "would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath") (citation omitted). Notably, the district court itself recognized the "biases the foreperson allegedly expressed in this case," describing them as "unfortunate." Pet. App. 34a.

Respondent speculates (Br. 57) that, if Ms. Whipple had been honest, the district court would have denied a motion to strike for cause, given that it denied a motion to strike Judith Abdo, who disclosed that her husband had been killed in a traffic accident. After extensive questioning, however, Ms. Abdo assured the court that she could follow the court's instructions and decide the case fairly and impartially. J.A. 147-151. Because Mr. Titus' affidavit demonstrates that Ms. Whipple could not have provided similar assurances, she was analogous not to Ms. Abdo, but rather to Barton Goodwin. After disclosing that he had been involved in a serious traffic accident and conceding that he could not decide the case fairly, Mr. Goodwin was dismissed for cause. J.A. 64, 119-120. If Ms. Whipple had been similarly honest, the district court surely would have excused her for cause as well.

In any event, to the extent this Court has any uncertainty about whether the testimony in this case would be sufficient to meet the *McDonough* standard, it merely confirms that the Court should leave that fact-bound question to the district court on remand. This Court granted certiorari solely to resolve the circuit conflict on whether Rule 606(b) permits the introduction of juror testimony about statements made during deliberations to show dishonesty during voir dire on a motion for new trial. The court of appeals erred by holding that Rule

606(b) bars the introduction of such testimony, and its judgment should therefore be reversed.

* * * * *

The judgment of the court of appeals should be reversed, and the case remanded for further proceedings.

Respectfully submitted.

STEVEN C. BEARDSLEY
GARY D. JENSEN
BEARDSLEY, JENSEN
& VON WALD, P.L.L.C.
4200 Beach Drive, Suite 3
P.O. Box 9579
Rapid City, SD 57709

KANNON K. SHANMUGAM
JAMES M. MCDONALD
MATTHEW B. NICHOLSON
LESLIE COOPER MAHAFFEY
WILLIAMS & CONNOLLY LLP
725 Twelfth Street, N.W.
Washington, DC 20005
(202) 434-5000
kshanmugam@wc.com

SEPTEMBER 2014

APPENDIX

APPENDIX A

The following decisions from California state courts involve the use of juror testimony about deliberations in support of a *McDonough* claim:

People v. *Castaldia*, 335 P.2d 104 (Cal. 1959)

Boone v. *Spring Hollow Farms*, 334 P.2d 78 (Cal. Ct. App. 1959)

Crespo v. *Cook*, 336 P.2d 31 (Cal. Ct. App. 1959)

Braly v. *Midvalley Chemical Co.*, 13 Cal. Rptr. 366 (Ct. App. 1961)

Winningar v. *Bales*, 14 Cal. Rptr. 908 (Ct. App. 1961)

Anderson v. *Pacific Gas & Electric Co.*, 32 Cal. Rptr. 328 (Ct. App. 1963)

Noll v. *Lee*, 34 Cal. Rptr. 223 (Ct. App. 1963)

Kraus v. *Walt Disney Pictures*, 34 Cal. Rptr. 702 (Ct. App. 1963)

People v. *Sanchez*, 43 Cal. Rptr. 131 (Ct. App. 1965)

MacColl v. *L.A. Metropolitan Transit Authority*, 48 Cal. Rptr. 662 (Ct. App. 1966)

Department of Water Resources v. *Natomas Co.*, 49 Cal. Rptr. 64 (Ct. App. 1966)

People ex rel. Department of Public Works v. *Curtis*, 63 Cal. Rptr. 138 (Ct. App. 1967)

People v. *Resendez*, 66 Cal. Rptr. 818 (Ct. App. 1968)

City of Pleasant Hill v. *First Baptist Church*, 82 Cal. Rptr. 1 (Ct. App. 1969)

Weathers v. *Kaiser Foundation Hospitals*, 485 P.2d 1132 (Cal. 1971)

Clemens v. *Regents of University of California*, 97 Cal. Rptr. 589 (Ct. App. 1971)

People v. *Aeschlimann*, 104 Cal. Rptr. 689 (Ct. App. 1972)

People v. *Murphy*, 111 Cal. Rptr. 295 (Ct. App. 1973)

Johns v. *City of Los Angeles*, 144 Cal. Rptr. 629 (Ct. App. 1978)

Smith v. *Covell*, 161 Cal. Rptr. 377 (Ct. App. 1980)

Morris v. *Frudenfeld*, 185 Cal. Rptr. 76 (Ct. App. 1982)

People v. *Diaz*, 200 Cal. Rptr. 77 (Ct. App. 1984)

Moore v. *Preventive Medicine Medical Group, Inc.*, 223 Cal. Rptr. 859 (Ct. App. 1986)

People v. *Blackwell*, 236 Cal. Rptr. 803 (Ct. App. 1987)

People v. *Evens*, 1 Cal. Rptr. 2d 1 (Ct. App. 1991)

People v. *Hord*, 19 Cal. Rptr. 2d 55 (Ct. App. 1993)

In re Hamilton, 20 Cal. 4th 273 (1999)

People v. *Hightower*, 114 Cal. Rptr. 2d 680 (Ct. App. 2001)

People v. *Steele*, 47 P.3d 225 (Cal. 2002), cert. denied, 537 U.S. 1115 (2003)

Erickson v. *Central Valley Towing, Inc.*, Nos. C038860 & C038988, 2004 WL 1922073 (Cal. Ct. App. Aug. 30, 2004)

People v. *Carter*, 117 P.3d 476 (Cal. 2005)

People v. *Gehrke*, No. D042984, 2006 WL 225671 (Cal. Ct. App. Jan. 31, 2006)

People v. *Castaldi*, No. B184074, 2006 WL 785350 (Cal. Ct. App. Mar. 29, 2006)

Harris v. *County of Los Angeles*, No. B185981, 2007 WL 2391259 (Cal. Ct. App. Aug. 23, 2007)

Moore v. *County of Los Angeles*, No. B189274, 2008 WL 192294 (Cal. Ct. App. Jan. 24, 2008)

People v. *Perez*, No. C052320, 2008 WL 652905 (Cal. Ct. App. Mar. 12, 2008)

Donovan v. *Poway Unified School District*, 84 Cal. Rptr. 3d 285 (Ct. App. 2008)

People v. *Lopez*, No. F053698, 2008 WL 5006610 (Cal. Ct. App. Nov. 26, 2008)

People v. *Tuggles*, 100 Cal. Rptr. 3d 820 (Ct. App. 2009)

In re Boyette, 301 P.3d 530 (Cal. 2013)

APPENDIX B

The following decisions from courts in the Ninth Circuit involve the use of juror testimony about deliberations in support of a *McDonough* claim:

Hard v. *Burlington Northern R.R.*, 812 F.2d 482 (9th Cir. 1987)

United States v. *Godines*, 124 F.3d 213 (9th Cir. 1997)

United States v. *Saya*, 101 F. Supp. 2d 1304 (D. Haw. 1999), aff'd, 247 F.3d 929 (9th Cir. 2001)

United States v. *Henley*, 238 F.3d 1111 (9th Cir. 2001)

United States v. *A.G.E. Enterprises, Inc.*, 15 Fed. Appx. 439 (9th Cir. 2001)

Pendergast v. *Newland*, 29 Fed. Appx. 459 (9th Cir. 2002)

Fields v. *Brown*, 503 F.3d 755 (9th Cir. 2007) (en banc)

United States v. *Hayat*, Crim. No. 05-240, 2007 WL 1454280 (E.D. Cal. May 17, 2007)

In re Hanford Nuclear Reservation Litigation, 497 F.3d 1005 (9th Cir. 2007), amended by 521 F.3d 1028, further amended and superseded by 534 F.3d 986 (9th Cir. 2008)

Bryant v. *Mattel, Inc.*, Civ. No. 04-9049, 2008 WL 3367605 (C.D. Cal. Aug. 8, 2008)

Hunt v. *Galaza*, Civ. No. 03-1723, 2009 WL 5183835 (E.D. Cal. Dec. 21, 2009), adopted by 2010 WL 457352 (E.D. Cal. Feb. 3, 2010)

Barabin v. *AstenJohnson, Inc.*, Civ. No. 07-1454, 2010 WL 5137898 (W.D. Wash. Dec. 10, 2010), vacated on other grounds, 700 F.3d 428 (9th Cir. 2012) and 740 F.3d 457 (9th Cir. 2014)

Apple, Inc. v. *Samsung Electronics. Co.*, Civ. No. 11-1846, 2012 WL 6574785 (N.D. Cal. Dec. 17, 2012)

Gonzales v. *Junda*, Civ. No. 12-3853, 2013 WL 2617679 (C.D. Cal. June 11, 2013)

Murray v. *McEwen*, Civ. No. 12-1022, 2013 WL 8284867 (C.D. Cal. Dec. 3, 2013), adopted by 2014 WL 1498161 (C.D. Cal. Apr. 15, 2014)

AMICUS CURIAE BRIEF

No. 13-517

In the Supreme Court of the United States

GREGORY P. WARGER, PETITIONER

v.

RANDY D. SHAUERS

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
LESLIE R. CALDWELL
Assistant Attorney General
MICHAEL R. DREEBEN
Deputy Solicitor General
SARAH E. HARRINGTON
Assistant to the Solicitor General
WILLIAM A. GLASER
Attorney
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether Federal Rule of Evidence 606(b) permits a party moving for a new trial based on juror dishonesty during voir dire to introduce juror testimony about statements made during deliberations that tend to show the alleged dishonesty.

TABLE OF CONTENTS

Page

Interest of the United States 1
Statement 1
Summary of argument 5
Argument:
A juror may not testify about statements made during jury deliberations in a challenge to the verdict based on alleged juror dishonesty during voir dire 8
A. A motion for a new trial based on juror dishonesty during voir dire involves an "inquiry into the validity of a verdict" under Rule 606(b) 9
1. The plain meaning of the phrase "inquiry into the validity of a verdict" includes inquiries into whether the jury that issued the verdict was properly constituted 9
2. Common-law traditions support the conclusion that new trial motions alleging voir dire dishonesty implicate the validity of verdicts 12
3. The legislative history of Rule 606(b) supports the conclusion that new trial motions alleging voir dire dishonesty implicate the validity of verdicts 19
4. Petitioner's view of Rule 606(b) would undermine its purposes and create an exception that swallows the rule 23
5. The canon of constitutional avoidance does not support petitioner's view of Rule 606(b) 28
B. Juror testimony about statements made during jury deliberations that tend to show dishonesty during voir dire is not admissible under Federal Rule of Evidence 606(b)(2)'s exception for "extraneous prejudicial information" 31
Conclusion 34
Appendix — Statutory provisions 1a

TABLE OF AUTHORITIES

Cases: Page

Adams v. *State*, 243 S.W. 474 (Tex. Crim. App. 1921).....13
Alabama Fuel & Iron Co. v. *Powaski*, 166 So. 782 (Ala. 1936).....13, 18
Arreola v. *Choudry*, 533 F.3d 601 (7th Cir.), cert. denied, 555 U.S. 1048 (2008).....32
Ayrshire Colleries Corp. v. *United States*, 331 U.S. 132 (1947).....10
Cain v. *Cain*, 40 Ky. (1 B. Mon.) 213 (1841).....18
Carson v. *Polley*, 689 F.2d 562 (5th Cir. 1982).....28
Clark v. *United States*, 289 U.S. 1 (1933).....7, 16, 17, 25
Drury v. *Franke*, 57 S.W.2d 969 (Ky. 1933).....13
FCC v. *Fox Television Stations, Inc.*, 556 U.S. 502 (2009).....28
Government of the V.I. v. *Gereau*, 523 F.2d 140 (3d Cir. 1975), cert. denied, 424 U.S. 917 (1976).....32
Hard v. *Burlington N.R.R.*, 812 F.2d 482 (9th Cir. 1987).....32
Head v. *Hargrave*, 105 U.S. 45 (1882).....31
Hinkel v. *Oregon Chair Co.*, 156 P. 438 (Or. 1916).....18
Hyde v. *United States*, 225 U.S. 347 (1912).....15, 16
Irvin v. *Dowd*, 366 U.S. 717 (1961).....10
Jordan v. *Massachusetts*, 225 U.S. 167 (1912).....29
Marquez v. *City of Albuquerque*, 399 F.3d 1216 (10th Cir. 2005).....32
Martinez v. *Food City, Inc.*, 658 F.2d 369 (Former 5th Cir. 1981).....32
Mathisen v. *Norton*, 60 P.2d 1 (Wash. 1936).....13, 18
Mattox v. *United States*, 146 U.S. 140 (1892).....15, 16
McCleskey v. *Kemp*, 481 U.S. 279 (1987).....27

Cases—Continued: Page

McDonald v. *Pless*, 238 U.S. 264 (1915) 23
McDonough Power Equip., Inc. v. *Greenwood*, 464 U.S. 548 (1984) 4, 10, 11, 25
Metropolitan R.R. v. *Moore*, 121 U.S. 558 (1887) 10
Morgan v. *Illinois*, 504 U.S. 719 (1992) 10
Norwood v. *State*, 58 S.W.2d 100 (Tex. Crim. App. 1933) 13
Payne v. *Burke*, 260 N.Y.S. 259 (App. Div. 1932) 13, 18
Perry v. *Bailey*, 12 Kan. 539 (1874) 15, 20
Shipley v. *Permanente Hosps.*, 247 P.2d 53 (Cal. Dist. Ct. App. 1954) 18
Shulinsky v. *Boston & Me. R.R.*, 139 A. 189 (N.H. 1927) 14
State v. *Cloud*, 58 So. 827 (La. 1912) 18
State v. *Hayden Miller Co.*, 116 N.W.2d 535 (Minn. 1962) 18
State v. *Kociolek*, 118 A.2d 812 (1955) 20
State v. *Serpas*, 179 So. 1 (La. 1938) 18
Tanner v. *United States*, 483 U.S. 107 (1987) ..... *passim*
Turner v. *Hall's Adm'x*, 252 S.W.2d 30 (Ky. 1952) 18
United States v. *Barraza*, 655 F.3d 375 (5th Cir. 2011) 27
United States v. *Benally*, 546 F.3d 1230 (10th Cir. 2008), cert. denied, 558 U.S. 1051 (2009) 5, 26, 28, 32
United States v. *Duzac*, 622 F.2d 911 (5th Cir.), cert. denied, 449 U.S. 1012 (1980) 32
United States v. *Freedland*, 111 F. Supp. 852 (D.N.D. 1953) 18
United States v. *Krall*, 835 F.2d 711 (8th Cir. 1987) 5, 32
United States v. *Oakland Cannabis Buyers' Coop.*, 532 U.S. 483 (2001) 28

Cases—Continued:

Page

United States v. *O'Brien*, 14 F.3d 703 (1st Cir. 1994) 32
United States v. *Villar*, 586 F.3d 76 (1st Cir. 2009).....32
Vaise v. *Delaval*, [1785] 99 Eng. Rep. 944 (K.B.).....12, 15
Williams v. *Bridges*, 35 P.2d 407 (Cal. Dist. Ct. App. 1934).....18
Williams v. *Price*, 343 F.3d 223 (3d Cir. 2003).....5
Willis v. *Davis*, 333 P.2d 311 (Okla. 1958) 18
Wilson v. *Wiggins*, 94 P.2d 870 (Ariz. 1939).....13, 18
Wright v. *Illinois & Miss. Tel. Co.*, 20 Iowa 195 (1866) 15, 16, 20

Constitution, statute and rules:

U.S. Const. Amend. VI 10, 29
Act of Jan. 2, 1975, Pub. L. No. 93-595, § 1, 88 Stat 1926 .....22, 2a
Fed. R. Civ. P.:
Rule 50 3
Rule 59 3
Fed. R. Evid.:
Rule 606(b) .....*passim*
Rule 606(b)(1) 5, 6, 8, 9, 12
Rule 606(b)(2) 4, 5, 31
Rule 606(b)(2)(A).....8, 31, 32
Rule 606(b)(2)(C).....22
Ariz. R. Crim. P. 24.1(d) 13

Miscellaneous: Page

Comm. on Rules of Proc. & Prac. of the Jud. Conf. of the U.S., *Revised Draft of Proposed Rules of Evidence for the United States Courts and Magistrates*, 51 F.R.D. 315 (1971) 19, 20

117 Cong. Rec. (1971):

p. 33,645 20

p. 33,655 20

H.R. Doc. No. 46, 93d Cong., 1st Sess. (1973) 21

H.R. Doc. No. 108, 109th Cong., 2d Sess. (2006) 22

H.R. Rep. No. 650, 93d Cong., 1st Sess. (1973) 21

Harry Kalven, Jr. & Hans Zeisel, *The American Jury* (1966) 28

3 Christopher B. Mueller & Laird C. Kirkpatrick, *Federal Evidence* (4th ed. 2013) 12, 23, 27, 31, 32

Rules of Evidence for the United States Courts & Magistrates, 56 F.R.D. 183 (1972) 21

S. Rep. No. 1277, 93d Cong., 2d Sess. (1974) 21, 22

8 John Henry Wigmore, *Evidence in Trials at Common Law* (John T. McNaughton rev. 1961) 12, 15, 18

27 Charles Alan Wright & Victor James Gold, *Federal Practice and Procedure: Evidence* (2d ed. 2007) 31, 32

In the Supreme Court of the United States

No. 13-517

GREGORY P. WARGER, PETITIONER

v.

RANDY D. SHAUERS

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

INTEREST OF THE UNITED STATES

This case involves the application of Federal Rule of Evidence 606(b) to claims of juror dishonesty during voir dire. Rule 606(b) applies to all actions in federal district courts, including federal criminal prosecutions and civil actions to which the United States is a party and in which a jury-trial right is implicated. Because the government frequently tries cases in federal district courts and defends verdicts against post-judgment attack, it has a substantial interest in the resolution of this case.

STATEMENT

1. On August 4, 2006, petitioner was riding a motorcycle southbound on U.S. Highway 385 in Pennington County, South Dakota. Pet. App. 13a, 18a, 21a-23a. Respondent was also driving southbound on

Highway 385, in a truck that was pulling a camper trailer. *Id.* at 13, 19a. When respondent attempted to drive around petitioner as petitioner waited to turn left, respondent's trailer hit petitioner's motorcycle. *Id.* at 18a-22a. As a result of the collision, petitioner suffered serious injuries including the loss of his lower left leg. *Id.* at 13a.

2. Petitioner filed suit against respondent in federal district court, asserting a claim of negligence. Pet. App. 13a.

a. The first jury trial ended in a mistrial. Pet. App. 2a, 13a-14a. During voir dire for the second trial, the district court informed potential jurors about the basic nature of the case. J.A. 38. The court asked the potential jurors: "Is there anyone knowing just those basic facts about this type of case who from your experience or background feel that you would not be a proper juror to hear this action?" *Ibid.* One person spoke up and was excused for cause. J.A. 39-40. The court repeated the substance of that question three times and no other juror responded. J.A. 40, 45.

Petitioner's counsel then asked individual jurors general questions about their feelings towards lawsuits, jury trials, and awarding damages for injuries. J.A. 59-76. Three jurors volunteered that they or members of their families had been involved in car or motorcycle collisions. J.A. 64-65, 68-70, 73. In response to two jurors' comments, petitioner's counsel noted that jurors cannot be "expect[ed]" to "shut out everything in the past," but jurors are expected to follow the law and do "the best [they] can." J.A. 70, 74.

Petitioner's counsel asked juror Regina Whipple (who later became the jury foreperson): "[H]ow do

you feel about lawsuits?" J.A. 62. She responded that they are "probably necessary * * * because everybody sees things differently." *Ibid.* When asked if she had a problem with awarding future medical expenses, Whipple said, "No." J.A. 83. She also said she could award damages for pain and suffering, J.A. 88-89, and would "make a decision on the facts and not on sympathy," J.A. 154. Petitioner's counsel asked other specific questions of the venire panel and closed by asking, "[I]s there any topic that you thought of since we started, other than the one we talked about, that you now have concluded, you know, I don't think I could be a fair and impartial juror on this kind of case[?]" J.A. 105. Whipple did not respond to any of the general questions, and she was seated on the jury. J.A. 57-59; 99-105; 188.

b. At trial, the parties introduced conflicting evidence about how fast respondent was driving and other details of the accident. Pet. App. 17a-23a. The jury returned a verdict in favor of respondent. *Id.* at 14a.

c. Petitioner filed a motion for judgment as a matter of law pursuant to Federal Rule of Civil Procedure 50, or in the alternative a new trial pursuant to Federal Rule of Civil Procedure 59. Pet. App. 14a. Petitioner argued that the verdict was (1) against the weight of the evidence, (2) the product of misconduct by respondent's counsel, and (3) the product of juror misconduct. *Ibid.*

In support of his juror-misconduct claim, petitioner submitted an affidavit from one of the jurors, Stacey Titus. Pet. App. 28a. Titus stated that, "during deliberations," Whipple "spoke about her daughter's experience, which included a motor vehicle collision in

which her daughter was at fault for the collision and a man died. She related that if her daughter had been sued, it would have ruined her life." *Id.* at 28a-29a. Titus expressed concern that Whipple "was influenced by her own daughter's experience, and not the facts, evidence, and law that was presented to us." *Id.* at 28a. Titus also opined that Whipple's statements "influenced other jurors because other jurors also expressed their concern about ruining the Shauers' life as they were a young couple." *Id.* at 29a.

The district court denied petitioner's motion. Pet. App. 12a-39a. As relevant here, the court rejected petitioner's juror-misconduct claim because petitioner failed to "present[] *admissible* evidence of juror bias." *Id.* at 29a (citing *McDonough Power Equip., Inc.* v. *Greenwood*, 464 U.S. 548, 554 (1984)). The court explained that Federal Rule of Evidence 606(b) "limits the court's inquiry" by "establish[ing] the general rule that a juror is not competent to testify as a witness on matters pertaining to the trial in which the juror sat." *Ibid.* The district court concluded that Titus's affidavit did not fall within Rule 606(b)(2)'s exceptions for evidence of "extraneous prejudicial information" or an "outside influence * * * improperly brought to bear on any juror." *Id.* at 31a (quoting Fed. R. Evid. 606(b)(2)). The court also rejected petitioner's argument that Titus's affidavit was admissible "to demonstrate the foreperson lied during voir dire," explaining that such a result "would undermine the purpose of Rule 606(b) and run[] counter to its directive." *Id.* at 35a, 38a.

3. The court of appeals affirmed. Pet. App. 1a-11a. The court held that Titus's affidavit was not admissible under the "extraneous prejudicial information"

exception to Rule 606(b)(2) because "[j]urors' personal experiences do not constitute extraneous information; it is unavoidable they will bring such innate experiences into the jury room." *Id.* at 7a. The court explained that the extraneous-information exception "includes objective events such as 'publicity and extra-record evidence reaching the jury room, and communication or contact between juror and litigants, the court, or other third parties,'" but does not include "juror testimony regarding possible subjective prejudices or improper motives of individual jurors." *Ibid.* (quoting *United States* v. *Krall*, 835 F.2d 711, 716 (8th Cir. 1987)).

The court of appeals also rejected petitioner's alternative argument that "Rule 606(b) should not exclude the affidavit because it is not being used to challenge the verdict, but rather to show a juror was dishonest during voir dire." Pet. App. 8a. The court held that juror testimony tending to show dishonesty during voir dire is not admissible in support of a motion for a new trial. *Id.* at 8a-10a (relying on *United States* v. *Benally*, 546 F.3d 1230, 1235 (10th Cir. 2008), cert. denied, 558 U.S. 1051 (2009); *Williams* v. *Price*, 343 F.3d 223, 235-237 (3d Cir. 2003) (Alito, J.)). Such an exception, the court explained, "risks swallowing the rule" because "[a] broad question during voir dire could then justify the admission of any number of jury statements that would be characterized as challenges to voir dire rather than challenges to the verdict." *Id.* at 9a (quoting *Benally*, 546 F.3d at 1236).

SUMMARY OF ARGUMENT

A. 1. Federal Rule of Evidence 606(b)(1) establishes a general rule prohibiting juror testimony about deliberations during an inquiry into the validity of a

verdict. When a litigant files a motion for a new trial, he is challenging the validity of a verdict and a hearing on such a motion is an inquiry into the validity of the verdict. A court cannot grant a new trial without vacating an existing verdict—and if a court vacates a verdict, that verdict is necessarily invalid. The same principle applies when a litigant argues for a new trial because the jury was improperly constituted—if the jury was improperly constituted, its verdict is invalid. Rule 606(b)(1)'s general prohibition therefore applies to all motions for new trials, including when the basis for such a motion is alleged juror dishonesty during voir dire.

2. Rule 606(b)'s general bar on jurors' testimony to impeach their own verdict has deep roots in the common law. The rule was established by Lord Mansfield in 1785 and was later adopted almost universally by American courts. Two strains of the Mansfield rule developed in America. Under the Iowa rule, jurors could not testify about matters that essentially inhere in the verdict itself (such as their own thought processes in reaching a verdict), but could testify about any other aspect of the jury's deliberations (such as whether the jury reached a verdict by flipping a coin). Only a few jurisdictions followed that approach. In contrast, a number of courts followed a broader exclusionary rule—a rule sometimes referred to as the federal rule—which prohibits a broader range of impeaching juror testimony, including testimony about overt acts that would be allowed under the Iowa rule. Many common-law courts applying the broader federal rule barred juror testimony about deliberations when offered to support a motion for a new trial based on alleged juror dishonesty in voir dire.

This Court's decision in *Clark* v. *United States*, 289 U.S. 1 (1933), is consistent with the broad federal rule. *Clark* involved a criminal contempt prosecution of a dishonest juror; it did not involve any inquiry into the validity of a jury's verdict. In allowing juror testimony about statements of another juror during deliberations to prove contempt, the Court recognized that impeachment of a verdict involved a distinct question.

3. When Congress enacted Rule 606(b) in 1974, it decisively chose the federal version of the Mansfield rule and rejected the Iowa version. After a rules-committee draft adopting the Iowa rule was widely criticized, the committee adopted a broader prohibition consistent with the federal version of the Mansfield rule. This Court approved that version of the rule and transmitted it to Congress. The House Judiciary Committee reverted to the Iowa rule. But the Senate Judiciary Committee and the Conference Committee both rejected that formulation, explaining that public policy requires a broader exclusionary rule.

As that drafting history makes plain, Congress was aware of the two different common-law strains of the Mansfield rule—and Congress rejected the Iowa rule in favor of the broader federal rule. Petitioner's argument is premised on the notion that Rule 606(b) codified the Iowa rule and must be rejected.

4. Petitioner's view of Rule 606(b) would undermine its purposes by inviting harassment of jurors, undermining the finality of judgments, and impeding full and frank discussion in the jury room. A central purpose of Congress was to bar testimony about matters such as whether a jury reached a verdict by flipping a coin. Under petitioner's interpretation, howev-

er, such testimony would be admissible as long as a juror was asked during voir dire (as essentially all jurors are) whether he would follow the judge's instructions and decide the case on the evidence alone. Such an exception would swallow the rule.

5. The canon of constitutional avoidance does not help petitioner in the face of Rule 606(b)(1)'s unambiguous language. And the court of appeals' correct interpretation of the rule does not raise any serious constitutional concerns. This Court has explained that the right to an impartial jury is adequately protected by various aspects of civil and criminal litigation and does not require eroding the prohibition in Rule 606(b)(1).

B. The Court should also reject petitioner's alternative argument that the testimony at issue is admissible under Rule 606(b)(2)(A)'s exception for extraneous prejudicial information. That exception applies only to information *relating to the case* that is improperly brought to the jury's attention. It does not apply to testimony about jurors' use of general background facts or other information unrelated to the case. Every juror brings her personal experiences and opinions to the jury room. Such information is not "extraneous" and is not admissible under Rule 606(b)(2)(A).

ARGUMENT

A JUROR MAY NOT TESTIFY ABOUT STATEMENTS MADE DURING JURY DELIBERATIONS IN A CHALLENGE TO THE VERDICT BASED ON ALLEGED JUROR DISHONESTY DURING VOIR DIRE

Federal Rule of Evidence 606(b)(1) provides that, "[d]uring an inquiry into the validity of a verdict or indictment, a juror may not testify about any statement made or incident that occurred during the jury's

deliberations; the effect of anything on that juror's or another juror's vote; or any juror's mental processes concerning the verdict or indictment." Fed. R. Evid. 606(b)(1). That principle of exclusion applies in proceedings that "inquir[e] into the validity of a verdict," including hearings on a motion for a new trial alleging juror dishonesty during voir dire.

A. A Motion For A New Trial Based On Juror Dishonesty During Voir Dire Involves An "Inquiry Into The Validity Of A Verdict" Under Rule 606(b)

Petitioner's primary submission (Br. 16-45) is that Rule 606(b) does not apply to his effort to vacate the jury's verdict and obtain a new trial because his pursuit of a new trial does not necessitate an inquiry into the validity of the verdict. The only inquiry the district court must make in order to rule on his motion for a new trial, petitioner argues (Br. 21), is whether juror Whipple lied during voir dire. Petitioner contends that that such an inquiry "has nothing to do with the jury's verdict at all," even though the relief he seeks is "vacatur of the judgment and a new trial." *Ibid.* That is incorrect. Although a motion for a new trial may require a district court to inquire into various aspects of the pre-trial, trial, and sentencing phases of a matter, the ultimate inquiry is whether the existing verdict should stand. That is an inquiry into the validity of the verdict covered by Rule 606(b).

1. The plain meaning of the phrase "inquiry into the validity of a verdict" includes inquiries into whether the jury that issued the verdict was properly constituted

The Constitution guarantees to civil litigants and criminal defendants the right to an "impartial trier of

fact" or an "impartial jury." *McDonough Power Equip., Inc.* v. *Greenwood*, 464 U.S. 548, 549, 554 (1984) (*McDonough Power*); see U.S. Const. Amend. VI. In both contexts, the right to an impartial jury is protected by the right to "an adequate *voir dire*," *Morgan* v. *Illinois*, 504 U.S. 719, 729 (1992), which "expos[es] possible biases, both known and unknown, on the part of potential jurors," *McDonough Power*, 464 U.S. at 554. "The necessity of truthful answers by prospective jurors if this process is to serve its purpose is obvious." *Ibid.*

A new trial motion based on alleged juror dishonesty during voir dire is an "inquiry into the validity of a verdict" under Rule 606(b). When a court grants a new trial, it must set aside the existing verdict. Such a remedy is warranted only when an error impugns the validity of the existing verdict. In considering other types of challenges to the validity of a tribunal, this Court has characterized the judgment of an improperly constituted panel of decisionmakers as "void." *Ayrshire Colleries Corp.* v. *United States*, 331 U.S. 132, 144 (1947) (judgment rendered by panel of two judges when statute required three); see *Irvin* v. *Dowd*, 366 U.S. 717, 727-728 (1961) (verdict and sentence "void" when pretrial publicity and voir dire questioning indicated jurors were not impartial); cf. *Metropolitan R.R.* v. *Moore*, 121 U.S. 558, 564 (1887) (listing bases for setting aside the verdict, including jury misconduct). A claim that a juror's dishonesty during voir dire requires a new trial is a claim that the juror's misconduct rendered the verdict invalid because it rendered the tribunal invalid. By the same token, a proceeding to consider such a claim is necessarily an "inquiry into the validity of the verdict."

Whenever a court considers a motion for a new trial, it inquires into the validity of the existing verdict regardless of the grounds asserted in support of the motion.

As petitioner notes (Br. 12-13, 19-20), a litigant alleging juror dishonesty during voir dire is entitled to a new trial if he "demonstrate[s] that a juror failed to answer honestly a material question on *voir dire*, and then further show[s] that a correct response would have provided a valid basis for a challenge for cause." *McDonough Power*, 464 U.S. at 556. It does not follow, however, that an inquiry into "juror dishonesty during voir dire," Pet. Br. I, "has nothing to do with the jury's verdict at all," *id.* at 21. The *McDonough Power* rule does not entitle a litigant to a new trial based on a showing of juror dishonesty alone. The litigant must demonstrate that correct information, if revealed, would have provided a valid basis to strike the juror *for cause*, ensuring that a court will grant a new trial *only* when defects in "a juror's impartiality can truly be said to affect the fairness of a trial." 464 U.S. at 556. In those instances, the seating of a biased juror renders the tribunal defective—which necessarily renders the tribunal's verdict invalid. The *McDonough Power* Court described its inquiry as whether "[t]o invalidate the result" of the trial based on a juror's dishonesty. *Id.* at 555. It is difficult to see how a decision whether to "invalidate" a verdict (*i.e.*, the result of a trial) can be described as having nothing to do with the validity of the verdict.

2. *Common-law traditions support the conclusion that new trial motions alleging voir dire dishonesty implicate the validity of verdicts*

As this Court explained in *Tanner* v. *United States*, 483 U.S. 107, 117-119 (1987), Rule 606(b)(1)'s general prohibition is based on the "firmly established common-law rule in the United States [that] flatly prohibited the admission of juror testimony to impeach a jury verdict," *id.* at 117. Petitioner argues (Br. 23-29) that the common-law tradition supports his view that an inquiry into a juror's dishonesty during voir dire is not an inquiry into the validity of a verdict—and that Rule 606(b) should be viewed as codifying that distinction. Petitioner is incorrect.

In 1785, Lord Mansfield first announced the rule that "flatly prohibited the admission of juror testimony to impeach a jury verdict." *Tanner*, 483 U.S. at 117; see *Vaise* v. *Delaval*, [1785] 99 Eng. Rep. 944 (K.B.); 8 John Henry Wigmore, *Evidence in Trials at Common Law* § 2352, at 696-697 (John T. McNaughton rev., 1961) (Wigmore). By the beginning of the twentieth century, American common law had absorbed that rule "firmly" and "near[ly]-universal[ly]." *Tanner*, 483 U.S. at 117; Wigmore § 2352, at 697. Over time, however, two different strains of the rule emerged in American courts—the Iowa rule and what is sometimes referred to as the federal rule.[1] 3 Christopher B. Mueller & Laird C. Kirkpatrick, *Federal Evidence* § 6:16, at 70-71 (4th ed. 2013) (*Federal Evidence*). Petitioner relies on common-law authorities

---

[1] For ease of reference, this brief refers to the broader formulation of Mansfield's rule as the federal rule. As discussed at pp. 13-14, 18, *infra*, that version of the rule was applied in many state common-law courts.

that followed the Iowa rule. But when Congress enacted Rule 606(b), it rejected that approach in favor of the broader federal common-law rule. See pp. 18-23, *infra*. Under the common-law approach codified in Rule 606(b), a litigant seeking to overturn a verdict may not introduce juror testimony about statements made during deliberations in order to prove juror dishonesty at voir dire.

a. Under the federal version of the common-law rule against admission of verdict-impeaching juror statements, the testimony and affidavit petitioner seeks to rely on are inadmissible. Common-law courts that applied the federal rule treated a motion for a new trial based on juror dishonesty during voir dire as an inquiry into the validity of the verdict. See *Wilson* v. *Wiggins*, 94 P.2d 870, 871 (Ariz. 1939) (motion for new trial on grounds that juror lied during voir dire was effort "to impeach" the verdict) (superseded by rule, Ariz. R. Crim. P. 24.1(d)); *Mathisen* v. *Norton*, 60 P.2d 1, 4 (Wash. 1936) (concluding that a juror's failure to disclose bias during voir dire "render[s] the verdict wholly abortive"); *Alabama Fuel & Iron Co.* v. *Powaski*, 166 So. 782, 787 (Ala. 1936) (rejecting argument that motion for new trial based on jurors' concealment during voir dire was not effort to impeach verdict); *Norwood* v. *State*, 58 S.W.2d 100, 101 (Tex. Crim. App. 1933) (concluding that a juror's failure to disclose information on voir dire showed "disqualification or prejudice," which was "sufficient, upon motion for new trial, to vitiate the verdict") (quoting *Adams* v. *State*, 243 S.W. 474, 475 (Tex. Crim. App. 1921)); *Drury* v. *Franke*, 57 S.W.2d 969, 985 (Ky. 1933) ("[A] verdict is illegal when a peremptory challenge is not exercised by reason of false information."); *Payne* v.

Burke, 260 N.Y.S. 259, 261-262 (App. Div. 1932) (motion for new trial based on allegation that juror lied during voir dire sought to "discredit the * * * verdict" and "render the verdict invalid"); *Shulinsky* v. *Boston & Me. R.R.*, 139 A. 189, 191 (N.H. 1927) (concluding a "verdict is * * * illegal" when false information during voir dire prevents a party from using a peremptory challenge).

Rule 606(b) embodies the federal version of the common-law rule. Under that approach, juror affidavits were not admissible in support of a motion for a new trial based on allegations of juror dishonesty during voir dire—and they are not admissible under Rule 606(b) either.

b. Petitioner maintains (Br. 23-30) that the common law did not bar juror testimony about statements made during deliberations that would tend to show a juror's dishonesty during voir dire—and argues that Rule 606(b) should be interpreted to carry forward that tradition. Petitioner's logic proceeds in the following steps: (1) at common-law, jurors' statements were inadmissible only on matters that "essentially inhere in the verdict itself," Br. 25, 29, 34; (2) that common-law tradition "barred jurors from testifying about the process by which the verdict was reached," Br. 23, but not about any other aspect of the jury's deliberations; and (3) when Congress enacted Rule 606(b), it codified that common-law rule, Br. 30. But petitioner is incorrect. Petitioner's formulation of the common law describes only one of the two strains that developed in American law. Critically, Congress expressly rejected that strain in favor of the other rule, see pp. 18-23, *infra*, which generally excludes juror testimony about all aspects of deliberations, including

statements that might show a juror was dishonest during voir dire.

In 1866, the Iowa Supreme Court first articulated the narrower strain of Lord Mansfield's rule on which petitioner relies. That court held that "affidavits of jurors may be received for the purpose of avoiding a verdict, to show any matter occurring during the trial or in the jury room, which does not essentially inhere in the verdict itself." *Wright* v. *Illinois & Miss. Tel. Co.*, 20 Iowa 195, 210 (1866). Under that rule, a juror could not testify that he "misunderstood the instructions of the court," was "unduly influenced by the statements or otherwise of his fellow jurors," or about any "other matter resting alone in the juror's breast." *Ibid.* A juror *could* testify, however, about any "overt act, open to the knowledge of all the jury, and not alone in the personal consciousness of one." *Perry* v. *Bailey*, 12 Kan. 539, 545 (1874) (following Iowa rule). A juror could testify, for example, that "the verdict was determined by aggregation and average or by lot," *Wright*, 20 Iowa at 210, or that "one juror was drunk while the jury were in their room deliberating," *Perry*, 12 Kan. at 545. Only a "few jurisdictions" followed Iowa's lead, while most jurisdictions followed the broader federal rule that did *not* permit jurors to testify about jurors' overt acts including whether the jury reached its verdict by lot and whether jurors were drunk. Wigmore § 2354, at 702; see *Vaise*, 99 Eng. Rep. at 944; *Tanner*, 483 U.S. at 117-118.

Before the enactment of Rule 606(b), this Court twice quoted the Iowa rule's formulation that jurors cannot testify about matters that "essentially inhere in the verdict." *Hyde* v. *United States*, 225 U.S. 347, 383-384 (1912); *Mattox* v. *United States*, 146 U.S. 140,

149 (1892). But in neither case did the Court's choice of words result in admitting juror testimony that would not have been admitted under the broader federal rule. In *Mattox*, the Court held that juror affidavits about prejudicial statements by a bailiff to jurors were admissible in support of a motion for a new trial. 146 U.S. at 147-149. The Court explored different formulations of Mansfield's rule and concluded that the statements at issue were admissible because they concerned an "extraneous influence," namely communications from a third party that occurred outside of the jury's deliberations. *Id.* at 148-149. The exception for "extraneous" information existed under both strains of the common-law rule and was codified in Rule 606(b). In *Hyde*, the Court purported to apply the Iowa rule in holding that juror affidavits were inadmissible to show an alleged bargain to convict some co-defendants and acquit others. 225 U.S. at 383-384. But that result is consistent with the federal version of the Mansfield rule—the Iowa rule, in contrast, permitted testimony by one juror about matters that more than one juror could verify or contradict, including jury compromises. *Wright*, 20 Iowa at 210. Thus, in neither case did this Court adopt the Iowa rule as the proper formulation of the common-law no-impeachment rule.

c. Petitioner argues (Br. 25-30) that this Court and a number of other "courts applying the common-law rule repeatedly held that the rule did not apply when juror testimony was being introduced to prove dishonesty at voir dire." Br. 25. The authorities on which petitioner relies do not support the rule he asks the Court to announce in this case. Petitioner relies primarily on this Court's decision in *Clark* v. *United*

States, 289 U.S. 1 (1933). That case lends no support to petitioner's position because it did not involve an attempt to impeach a jury's verdict. In *Clark*, a former juror was convicted of contempt based on her failure to disclose certain biases during voir dire in a separate case. *Id.* at 6-8. In the contempt proceeding, the district court considered testimony from her co-jurors that Clark had refused to listen during deliberations. *Id.* at 9. On appeal, Clark argued that the juror testimony violated an evidentiary privilege protecting "the arguments and votes of jurors." *Id.* at 12-14. This Court rejected Clark's assertion of privilege and upheld the conviction. *Id.* at 12-19. The Court was careful to explain, however, that nothing in that decision conflicted with—or even reflected on—the common-law rule prohibiting juror testimony to impeach a verdict. *Id.* at 13, 18. As the Court noted, because the jury on which Clark sat was a hung jury, no verdict was available to impeach. *Id.* at 18. "But in truth," the Court added, "the rule against impeachment is wholly unrelated to the problem now before us"—whether juror testimony may be admitted in a *separate* contempt proceeding. *Ibid.*; see *id.* at 13 (noting that treatise writers had "confused" the notion of a juror privilege "with something very different, the competency of witnesses to testify in impeachment of a verdict").

Given the Court's holding and reasoning, *Clark* does not establish that the common-law no-impeachment rule allowed juror testimony to show dishonesty during voir dire in order to set aside a verdict. Petitioner's contrary reading of *Clark* (Pet. Br. 25, 34) ignores that no aspect of the prosecution at issue in *Clark* sought to impeach a verdict. That was

not only because the jury in question had not reached a verdict, but also because a contempt conviction would not have resulted in vacatur of the jury's verdict or the grant of a new trial even if the jury had not hung.

Petitioner contends (Br. 28-29) that a number of other courts applying the common-law rule admitted juror testimony related to dishonesty during voir dire. Like *Clark*, several of the cases on which petitioner relies involved contempt or perjury proceedings against former jurors in which the no-impeachment rule does not apply (with respect to the prior verdict). See, *e.g.*, *United States* v. *Freedland*, 111 F. Supp. 852 (D.N.D. 1953); *State* v. *Serpas*, 179 So. 1, 3 (La. 1938) (both cases cited at Wigmore § 2354, at 712 n.5, cited at Pet. Br. 28). Most of the other cases on which petitioner relies applied the Iowa version of the no-impeachment rule. See *Williams* v. *Bridges*, 35 P.2d 407, 408-409 (Cal. Dist. Ct. App. 1934); *State* v. *Hayden Miller Co.*, 116 N.W.2d 535, 539 (Minn. 1962); *Mathiesen*, 60 P.2d at 2-4 (Wash.); see also *Shipley* v. *Permanente Hosps.*, 274 P.2d 53, 56-57 (Cal. Dist. Ct. App. 1954) (following *Williams*) (all cases cited at Pet. Br. 29). And, as petitioner recognizes (Br. 29 n.3), many other courts applying the broader federal law no-impeachment rule reached the opposite conclusion. See *Powaski*, 166 So. at 786-787 (Ala.); *Wilson*, 94 P.2d at 872 (Ariz.); *Turner* v. *Hall's Adm'x*, 252 S.W.2d 30, 34 (Ky. 1952); *State* v. *Cloud*, 58 So. 827, 828 (La. 1912); *Payne*, 260 N.Y.S. at 262-263; *Willis* v. *Davis*, 333 P.2d 311, 314 (Okla. 1958); *Hinkel* v. *Oregon Chair Co.*, 156 P 438, 439 (Or. 1916); see also *Cain* v. *Cain*, 40 Ky. (1 B. Mon.) 213, 213 (1841) (affi-

davit inadmissible after verdict to show "partiality" of another juror).

In sum, although some common-law courts followed the Iowa rule on which petitioner relies, many others followed the broader federal rule that would have excluded the evidence at issue here. As shown below, Congress opted for the broader exclusionary rule when it enacted Rule 606(b).

3. The legislative history of Rule 606(b) supports the conclusion that new trial motions alleging voir dire dishonesty implicate the validity of verdicts

1. As originally drafted by the Advisory Committee on Rules of Evidence, Rule 606(b) prohibited admission of juror testimony only if it related to jurors' mental processes in reaching a verdict. The draft stated:

> Upon an inquiry into the validity of a verdict or indictment, a juror may not testify concerning the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith. Nor may his affidavit or evidence of any statement by him indicating an effect of this kind be received for these purposes.

Comm. on Rules of Prac. & Proc. of the Jud. Conf. of the U.S., *Revised Draft of Proposed Rules of Evidence for the United States Courts and Magistrates*, 51 F.R.D. 315, 387 (1971). The initial draft language relied on the Iowa rule, drawing "the dividing line between testimony as to mental processes, on the one hand, and as to the existence of conditions or occurrences of events calculated improperly to influence the

verdict, on the other hand." *Id.* at 387 advisory committee's note (citing *Wright*, *supra* (Iowa); *Perry*, *supra* (Kan.); *State* v. *Kociolek*, 118 A.2d 812 (N.J. 1955)). The Committee explained that "[a]llowing [jurors] to testify as to matters other than their own inner reactions involves no particular hazard to the values sought to be protected" and stated expressly that "[t]he rule is based upon this conclusion." *Id.* at 388 advisory committee's note.

The draft rule was widely criticized, in particular by the Department of Justice and the influential Senator McClellan. See *Tanner*, 483 U.S. at 122. The Department of Justice "disagree[d] with the comment in the Advisory Committee's Note, that there is a trend toward allowing jurors to testify about everything but their own mental process." 117 Cong. Rec. 33,655 (1971). The Department explained that "[r]ecent federal decisions show continued adherence to the rule that jurors cannot testify about irregularities in their deliberations." *Ibid.* (citing cases). The Department proposed new language for the rule that closely tracks the language of the rule that was ultimately adopted. Compare *ibid.* with Fed. R. Evid. 606(b). Senator McClellan's letter similarly criticized the draft for allowing "the impeachment of verdicts by inquiry into, not the mental processes themselves, but what happened in terms of conduct in the jury room." 117 Cong. Rec. at 33,645. Such a rule, Senator McClellan explained, would create "mischief" and would make it "[im]possible to conduct trials, particularly criminal prosecutions, as we know them today." *Ibid.*

The Advisory Committee then adopted a broader version of the rule that prohibited the admission of

testimony on "any matter or statement occurring during the course of the jury's deliberations," and added exceptions for evidence of extraneous prejudicial information and outside influences. *Rules of Evidence for United States Courts & Magistrates*, 56 F.R.D. 183, 265 (1972). This Court adopted the second version of Rule 606(b) and transmitted it to Congress. See *Tanner*, 483 U.S. at 122. The Court explained that the proposed rule adhered to the decisions of federal courts, the "central focus" of which had "been upon insulation of the manner in which the jury reached its verdict, * * * extend[ing] to each of the components of deliberation, including arguments, discussions, mental and emotional reactions, votes, and any other feature of the process." H.R. Doc. No. 46, 93d Cong., 1st Sess. 99 (1973).

The House Judiciary Committee preferred the Advisory Committee's original version of the rule, believing that the Iowa version of the common-law rule was "the better practice." H.R. Rep. No. 650, 93d Cong., 1st Sess. 10 (1973). The Senate Judiciary Committee rejected the House version, which "would have the effect of opening verdicts up to challenge on the basis of what happened during the jury's internal deliberations." S. Rep. No. 1277, 93d Cong., 2d Sess. 13 (1974). The Senate Report reflected a particular concern that deliberations be protected from scrutiny:

> Public policy requires a finality to litigation. And common fairness requires that absolute privacy be preserved for jurors to engage in the full and free debate necessary to the attainment of just verdicts. Jurors will not be able to function effectively if their deliberations are to be scrutinized in post-trial litigation. In the interest of protecting

> the jury system and the citizens who make it work, rule 606 should not permit any inquiry into the internal deliberation of the jurors.

Id. at 14. The Conference Committee adopted, and Congress ultimately enacted, this Court's proposed rule, which prohibited juror testimony as to "any matter or statement occurring during the course of the jury's deliberations." Act of Jan. 2, 1975, § 1, Pub. L. No. 93-595, 88 Stat. 1934 (Fed. R. Evid. 606(b)).[2]

By rejecting the Iowa-based version of the rule preferred by the House and instead adopting the Senate's rule prohibiting juror testimony about "any statement made or incident that occurred during the jury's deliberations," Congress chose sides between the two strains of common-law decisions. In short, Congress rejected petitioner's preferred strain of the common-law rule. Petitioner's view that Rule 606(b) is directed only at testimony about "how the verdict was reached," Br. 14, 30, 31, finds no support in the broader federal common-law rule that Congress codified. The consequences of Congress's choice are illustrated by *Tanner*, in which this Court held that jurors could not testify that other jurors were drunk during deliberations. Those jurors had evidence that might have demonstrated that other jurors were incompetent or incapacitated during deliberations—but testimony about such matters was inadmissible under the broader federal common-law rule

---

[2] Congress has made several minor and non-material amendments to Rule 606(b) since its adoption. The only significant amendment was in 2006, when Congress added the exception in what is now Rule 606(b)(2)(C) and altered the text to list each exception separately. H.R. Doc. No. 108, 109th Cong., 2d Sess. 5 (2006).

and, this Court held, is inadmissible under Rule 606(b). "[T]he legislative history demonstrates with clarity that Congress specifically understood, considered, and rejected a version of Rule 606(b) that would have allowed jurors to testify on juror conduct during deliberations," *Tanner*, 483 U.S. at 125, including juror statements that might demonstrate a juror was dishonest during voir dire. See *Federal Evidence* § 6:17, at 75 ("The important point is that it would be hard to paint with a broader brush. The exclusionary principle embodied in Rule 606(b) reaches quite literally everything that relates to, or describes or depicts, the jury's deliberative processes unless one of the exceptions applies.").

4. Petitioner's view of Rule 606(b) would undermine its purposes and create an exception that swallows the rule

In *Tanner*, this Court examined the "[s]ubstantial policy considerations [that] support the common-law rule against the admission of jury testimony to impeach a verdict." 483 U.S. at 119. The Court explained that the "common-law rule against the admission of jury testimony to impeach a verdict" protects jurors from being "harassed and beset by the defeated party in an effort to secure from them evidence of facts which might establish misconduct sufficient to set aside a verdict." *Id.* at 119, 120 (quoting *McDonald* v. *Pless*, 238 U.S. 264, 267 (1915)). Such a result, the Court explained, would risk "the destruction of all frankness and freedom of discussion and conference." *Id.* at 120 (quoting *McDonald*, 238 U.S. at 268). The Court recognized that "postverdict investigation into juror misconduct would in some instances lead to the invalidation of verdicts reached after irresponsible or improper juror behavior"—but concluded that "[i]t is

not at all clear * * * that the jury system could survive such efforts to perfect it." *Ibid.* The Court explained that Rule 606(b) protects "the finality of the process," "full and frank discussion in the jury room, jurors' willingness to return an unpopular verdict, and the community's trust in a system that relies on the decisions of laypeople." *Id.* at 120-121.

a. Petitioner argues that (Br. 40-44) that admitting juror testimony to show voir dire dishonesty in support of a motion for a new trial "would not discourage 'full and frank discussion in the jury room,'" Br. 40 (quoting *Tanner*, 483 U.S. at 120), and would not subject jurors to increased harassment because jurors are already permitted (or required) to reveal information about deliberations in other contexts. Jurors may, for example, speak to the press about deliberations following a verdict. And juror testimony about deliberations may be sought before a verdict is entered or in post-verdict collateral proceedings that do not seek to impeach the jury's verdict. Petitioner argues (Br. 40-42) that his reading of Rule 606(b) would not undermine its purposes any more than those already-available windows on jury deliberations have.

The problem with petitioner's argument is that it proves too much. Petitioner is correct that jurors may share jury-room deliberations in a number of contexts, such as media interviews or pre-verdict hearings. But this Court has repeatedly endorsed the value of protecting jurors in proceedings seeking to invalidate their verdict—and Congress plainly subscribed to that view in enacting Rule 606(b). All parties to this case would agree that a juror in the *Tanner* case could have spoken about other jurors' drinking either to

reporters after the verdict or to the presiding judge before the verdict. See 483 U.S. at 127. Yet this Court held that Rule 606(b) prohibits the admission of testimony about such misconduct in support of a motion for a new trial. Rule 606(b) promotes full and frank juror discussion and discourages harassment of jurors by prohibiting a particular type of inquiry into their deliberations. That clear prohibition is not rendered ineffective merely because it does not apply to all conceivable situations.

Petitioner also argues (Br. 41) that, because jurors might be required to testify about deliberations to show dishonesty during voir dire in a criminal contempt proceeding, allowing jurors to testify about deliberations in order to prove such dishonesty in a new-trial motion would not pose any additional risk of chilling jurors' full and frank discussions in the jury room. Petitioner is incorrect. In order to convict a juror for contempt, the government must prove that the juror intentionally concealed information or gave false information with a "design * * * to obstruct the processes of justice." *Clark*, 289 U.S. at 10. Because that standard of proof is high, such prosecutions are rare. In contrast, if the Court were to adopt petitioner's view of Rule 606(b), nearly every losing litigant would have an incentive to pry into jury deliberations in search of any stray statement that might diverge from a juror's answer to a general voir dire question. As this Court explained in *McDonough Power*, "jurors are not necessarily experts in English usage," and it can be difficult to draw a line between purposefully dishonest voir dire answers and "mistaken, though honest, response[s]." 464 U.S. at 555. Creating such a large loophole in Rule 606(b)'s gen-

eral rule of exclusion is much more likely to chill jurors' willingness to speak openly during deliberations than the threat of contempt does.

b. Petitioner also argues (Br. 44-45) that adopting his view of Rule 606(b) would not undermine the finality of trials because efforts to obtain a new trial based on alleged juror dishonesty during voir dire will not always succeed. It is difficult to see how that obvious point distinguishes this category of efforts to overturn a verdict from any other. A litigant who seeks a new trial based on juror testimony that a verdict was reached by lot or that jurors were drunk during the trial may find that, "[a]fter reviewing the proffered testimony, a court [w]ould reject it as not credible." Pet. Br. 45. Rule 606(b) still prohibits the admission of such testimony, not only because such evidence would "in some instances lead to the invalidation of verdicts," *Tanner*, 483 U.S. at 120, but also because a general rule of admissibility would lead to increased attacks on jury verdicts and inroads on the jurors' confidence that they would not be subject to post-verdict attacks by the public.

c. Even more to the point, adopting petitioner's approach to Rule 606(b) would create an exception that swallows the rule. Many attempts to impeach a verdict with juror testimony could be "recharacterized as challenges to voir dire." *United States* v. *Benally*, 546 F.3d 1230, 1236 (10th Cir. 2008), cert. denied, 558 U.S. 1051 (2009). Judges and lawyers frequently ask potential jurors whether they will follow the law as explained in the judge's instructions and decide the case based on the evidence. Under petitioner's approach, an affirmative answer to such a question could open a verdict to impeachment based

on testimony that jurors flipped a coin, arrived at damages by taking an average, were influenced by a defendant's failure to testify, speculated on matters not supported by the evidence, reached a verdict for political purposes, or were influenced by dislike of an attorney or party. Rule 606(b) bars all these types of testimony during an inquiry into the validity of a verdict. See *Federal Evidence* § 6:17, at 76-88 (compiling cases).

Similarly, a general voir dire question about whether a juror can be impartial could open the door to a host of post-verdict allegations of bias that are well within Rule 606(b)'s general prohibition. Jurors necessarily bring their life experiences with them to the jury room. Such experiences will inevitably be brought to bear on the jury's decision-making by influencing, *e.g.*, jurors' application of a standard of reasonableness, jurors' assessment of the credibility of witnesses, and jurors' calculation of damages for pain and suffering. See *United States* v. *Barraza*, 655 F.3d 375, 380 (5th Cir. 2011) ("We cannot expunge from jury deliberations the subjective opinions of jurors, their attitudinal expositions, or their philosophies.") (citation omitted), cert. denied, 132 S. Ct. 1590 (2012). A juror's general voir dire statement that she can be unbiased should not open a later verdict to impeachment based on the testimony of other jurors that she, for example, considered an insurance adjuster's testimony to lack credibility based on her previous experience with insurance adjusters. As this Court has explained, "it is the jury's function to make the difficult and uniquely human judgments that defy codification and that 'buil[d] discretion, equity, and flexibility into a legal system.'" *McCleskey* v. *Kemp*,

481 U.S. 279, 311 (1987) (brackets in original) (quoting Harry Kalven, Jr. & Hans Zeisel, *The American Jury* 498 (1966)). The level of internal scrutiny of jury deliberations that petitioner seeks "would have the result that 'every jury verdict would either become the court's verdict or would be permitted to stand only by the court's leave.'" *Benally*, 546 F.3d at 1233 (quoting *Carson* v. *Polley*, 689 F.2d 562, 581 (5th Cir. 1982)).

5. The canon of constitutional avoidance does not support petitioner's view of Rule 606(b)

Petitioner argues (Br. 37-40) that the canon of constitutional avoidance requires the Court to adopt his limited view of Rule 606(b) in order to avoid "a violation of the litigant's constitutional right to an impartial jury." Pet. Br. 38. Petitioner is incorrect. The canon of constitutional avoidance "is an interpretive tool," *FCC* v. *Fox Television Stations, Inc.*, 556 U.S. 502, 516 (2009), that "has no application in the absence of statutory ambiguity," *United States* v. *Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 494 (2001). As explained, the phrase "inquiry into the validity of a verdict" unambiguously includes inquiries into whether a verdict should be set aside and a new trial granted based on alleged juror dishonesty. Constitutional avoidance has no role to play in interpreting that text.

In any event, the court of appeals' correct interpretation of Rule 606(b) does not raise serious constitutional concerns. Although the Constitution guarantees litigants an impartial jury, it does not guarantee that parties may use any means to vindicate that right post-trial. This Court rejected that argument in *Tanner* in the face of allegations that jurors had used drugs and alcohol during the trial. 483 U.S. at 113.

Although the Court recognized that "a defendant has a right to 'a tribunal both impartial and mentally competent to afford a hearing,'" the Court rejected the notion that the Sixth Amendment (in the criminal context) required the Court to imply an exception to Rule 606(b) in order to determine whether a particular tribunal was in fact impartial and mentally competent. *Id.* at 126-127 (quoting *Jordan* v. *Massachusetts*, 225 U.S. 167, 176 (1912)).

The *Tanner* Court reasoned that the defendant's right to an unimpaired jury in that case was protected by four aspects of the trial process: (1) voir dire examination, (2) observation of the jury by the judge and other court personnel during the trial, (3) observation of jurors by each other with the opportunity to report inappropriate behavior to the court before a verdict is rendered, and (4) post-verdict impeachment of a verdict by non-juror evidence of misconduct. 483 U.S. at 127. Although each of those protections will not be equally effective at discovering different types of juror misconduct, in the aggregate they adequately protect a litigant's right to a fair trial. In this case, petitioner could have better availed himself of the available protections by, *e.g.*, asking Whipple (or the entire venire panel) whether she or her family members had ever been in a serious automobile collision or by seeking and introducing non-juror testimony that Whipple's daughter had been involved in a fatal car accident.

Although petitioner concedes that this case involves no claim of racial bias, he urges (Br. 39-40) the Court to adopt an atextual interpretation of Rule 606(b) in order to allow the use of juror testimony about racially prejudiced statements during delibera-

tions to prove that a juror dishonestly claimed in voir dire to be unbiased. Racial bias is certainly an odious force in the legal system; but courts are not helpless to uncover it without intruding on the jury's deliberative process. Voir dire, combined with the threat of contempt or perjury charges, is generally an effective means of uncovering hidden biases. In addition, before a verdict is entered, other jurors are free to bring to the presiding judge's attention any biased statements made during deliberations and judges are free to advise jurors of their right to do so. Finally, counsel for a party may use investigative means other than interviewing jurors to determine whether any juror harbored an improper bias. If a juror harbors a racial bias, it is unlikely that the only evidence of such a bias will be an isolated statement during jury service.

Petitioner's constitutional-avoidance argument fails for an additional reason. If petitioner were correct that a litigant's constitutionally guaranteed right to a fair trial can be protected only by admitting juror testimony about deliberations that would show that a juror was dishonest during voir dire, perhaps a litigant would also have a right to subpoena and examine jurors as to the content of deliberations. Petitioner lauds (Br. 42-43) the limits that local court rules and ethics rules place on lawyers and litigants' ability to question jurors after trial. And he acknowledges (Br. 43) that judges are free to limit such communications even absent a general practice. It would be strange if the Constitution entitled a litigant to introduce the type of evidence at issue here, while a litigant's ability to obtain such evidence depended entirely on chance impulsive disclosures by individual jurors.

B. Juror Testimony About Statements Made During Jury Deliberations That Tend To Show Dishonesty During Voir Dire Is Not Admissible Under Federal Rule Of Evidence 606(b)(2)'s Exception For "Extraneous Prejudicial Information"

Petitioner argues in the alternative (Br. 45-48) that juror testimony about statements in deliberations tending to show dishonesty in voir dire fits within the exception in Rule 606(b)(2)(A) for "extraneous prejudicial information." Petitioner is incorrect.

The exception for testimony about "extraneous prejudicial information" "brought to the jury's attention" applies only to "particular information *relating to the case* that might affect the verdict," such as a juror's "specific personal knowledge about the parties or controversy" or information about the case obtained through news media or a juror's own investigations. *Federal Evidence* § 6:18, at 91-92 (emphasis added) (citing cases). The exception does not allow admission of testimony about jurors' use of "general background facts or data having nothing specifically to do with the case." 27 Charles Alan Wright & Victor James Gold, *Federal Practice and Procedure: Evidence* § 6075, at 531 (2d ed. 2007) (Wright & Gold). Although jurors should not "act in any case upon particular facts material to its disposition resting in their private knowledge, * * * they may, and to act intelligently they must, judge of the weight and force of that evidence by their own general knowledge of the subject of inquiry." *Head* v. *Hargrave*, 105 U.S. 45, 49 (1882).

The exception for admission of evidence about extraneous prejudicial information "has been construed to cover publicity received and discussed in the jury

room, consideration by the jury of evidence not admitted in court, and communications or other contact between jurors and third persons." *Government of the V.I.* v. *Gereau*, 523 F.2d 140, 149 (3d Cir. 1975) (footnotes omitted), cert. denied, 424 U.S. 917 (1976); see *Benally*, 546 F.3d at 1236. Courts of appeals generally agree that "[a] juror's personal experience, however, does not constitute 'extraneous prejudicial information.'" *Marquez* v. *City of Albuquerque*, 399 F.3d 1216, 1223 (10th Cir. 2005) (citation omitted); see *Benally*, 546 F.3d at 1237; *Arreola* v. *Choudry*, 533 F.3d 601, 606 (7th Cir.), cert. denied, 555 U.S. 1048 (2008); *United States* v. *O'Brien*, 14 F.3d 703, 708 (1st Cir. 1994); *Hard* v. *Burlington N.R.R.*, 812 F.2d 482, 486 (9th Cir. 1987); *United States* v. *Duzac*, 622 F.2d 911, 913 (5th Cir.), cert. denied, 449 U.S. 1012 (1980). Courts of appeals also generally agree that "possible subjective prejudices or improper motives of individual jurors" do not fall within the exception. *United States* v. *Krall*, 835 F.2d 711, 716 (8th Cir. 1987); see *United States* v. *Villar*, 586 F.3d 76, 83-84 (1st Cir. 2009); *Benally*, 546 F.3d at 1237-1238; *Martinez* v. *Food City, Inc.*, 658 F.2d 369, 373 (Former 5th Cir. 1981); see also Wright & Gold § 6075, at 520-521 (observing that "more general influences on a verdict, such as the values or biases applied by the jury to weigh the evidence, are not within the scope" of the exception).

The court of appeals in this case correctly declined to admit juror testimony about Whipple's statements during deliberations under the exception in Rule 606(b)(2)(A) because those statements did not involve "particular information relating to the case," *Federal Evidence* § 6:18, at 91. Whipple's alleged statements

about her daughter's car accident had nothing to do with the specific parties or incident at issue in this case. Her views about her daughter's accident were no more "extraneous prejudicial information" than the *Tanner* jurors' use of alcohol was or than any other jurors' opinion based on life experiences would be.

Petitioner argues (Br. 46) that, when a juror fails to reveal in voir dire information that would have disqualified her from jury service, that juror was not competent to serve on the jury and any statements she made about the information that would have disqualified her is extraneous. That argument is foreclosed by this Court's decision in *Tanner*, which explained that courts have traditionally "treated allegations of the physical or mental incompetence of a juror as 'internal' rather than 'external' matters." 483 U.S. at 118. Even if one viewed Whipple's alleged omissions during voir dire as disqualifying her from jury service, she was surely no less competent to serve on the jury than were the *Tanner* jurors who were drunk, using drugs, and sleeping through the trial. See *id.* at 113-115.

CONCLUSION

The judgment of the United States Court of Appeals for the Eighth Circuit should be affirmed.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
LESLIE R. CALDWELL
Assistant Attorney General
MICHAEL R. DREEBEN
Deputy Solicitor General
SARAH E. HARRINGTON
Assistant to the Solicitor General
WILLIAM A. GLASER
Attorney

AUGUST 2014

APPENDIX

1. Federal Rule of Evidence 606 provides:

Juror's Competency as a Witness

(a) At the Trial. A juror may not testify as a witness before the other jurors at the trial. If a juror is called to testify, the court must give a party an opportunity to object outside the jury's presence.

(b) During an Inquiry into the Validity of a Verdict or Indictment.

(1) Prohibited Testimony or Other Evidence. During an inquiry into the validity of a verdict or indictment, a juror may not testify about any statement made or incident that occurred during the jury's deliberations; the effect of anything on that juror's or another juror's vote; or any juror's mental processes concerning the verdict or indictment. The court may not receive a juror's affidavit or evidence of a juror's statement on these matters.

(2) Exceptions. A juror may testify about whether:

(A) extraneous prejudicial information was improperly brought to the jury's attention;

(B) an outside influence was improperly brought to bear on any juror; or

(C) a mistake was made in entering the verdict on the verdict form.

2. Act of Jan. 2, 1975, Pub. L. No. 93-595, § 1, 88 Stat 1926, 1934 (original enactment of Fed. R. Evid. 606) provided in pertinent part:

Rule 606. Competency of Juror as Witness

(a) At the trial.—A member of the jury may not testify as a witness before that jury in the trial of the case in which he is sitting as a juror. If he is called so to testify, the opposing party shall be afforded an opportunity to object out of the presence of the jury.

(b) Inquiry into validity of verdict or indictment.—Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear on any juror. Nor may his affidavit or evidence of any statement by him concerning a matter about what he would be precluded from testifying be received for these purposes.

AMICUS CURIAE BRIEF

No. 13-517

IN THE

Supreme Court of the United States

GREGORY P. WARGER,

Petitioner,

v.

RANDY D. SHAUERS,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

AMICUS CURIAE BRIEF OF THE AMERICAN ASSOCIATION FOR JUSTICE IN SUPPORT OF RESPONDENT

Lisa Blue Baron
AMERICAN ASSOCIATION FOR JUSTICE
777 6th Street N.W.
Suite 200
Washington, DC 20001
(202) 965-3500
President

Jeffrey R. White
Counsel of Record
CENTER FOR CONSTITUTIONAL LITIGATION, P.C.
777 6th Street N.W.
Suite 520
Washington, DC 20001
(202) 944-2839
(202) 965-0920 (fax)
jeffrey.white@cclfirm.com
Attorney for Amicus Curiae

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iv

IDENTITY AND INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 5

I. HISTORY, THE TEXT OF FEDERAL RULE OF EVIDENCE 606(B), AND COMPELLING PUBLIC POLICY COUNSEL AGAINST PETITIONER'S PROPOSAL TO EXPAND JUDICIAL INQUIRY INTO JURY DELIBERATIONS. 5

A. This Court Has Jealously Guarded the Jury Right by Crafting a Rule That Carefully Balances the Need to Protect the Jurors' Internal Motives and Decisionmaking With the Need to Provide a Fair and Impartial Jury. 5

1. Historically this Court has permitted juror testimony regarding deliberations only to show extraneous information or outside influence affecting the jury. 6

2. The secrecy of juror deliberations protects the jurors' essential function of bringing their own general knowledge and experience to bear on the evidence. 8

B. Rule 606(b) Strikes the Appropriate Balance by Excluding Testimony Regarding Jurors' Mental Processes in Proceedings Seeking to Overturn Their Verdict While Allowing Testimony That Reveals the Jury's Exposure to Extraneous Prejudicial Information and Improper Outside Influences. 12

II. THERE IS NO NEED TO DEVISE A SPECIAL EXCEPTION TO RULE 606(b) FOR *MCDONOUGH* NEW TRIAL MOTIONS BASED ON JUROR DISHONESTY DURING VOIR DIRE. 16

A. *McDonough* Provides Ground for a New Trial Based on Juror Dishonesty on Voir Dire, But the Admissibility of Juror Testimony to Establish Juror Dishonesty Remains Subject to Federal Rule of Evidence 606(b). 16

1. *McDonough* does not provide for the admissibility of juror testimony to establish

dishonesty on voir dire, and so is subject to Rule 606(b)..... 16

B. There Are Other Means to Protect the Impartiality of Jurors Short of Ordering a New Trial for Dishonesty on Voir Dire..... 22

III. STRONG POLICY REASONS COUNSEL AGAINST PERMITTING LITIGANTS TO INTRODUCE JUROR TESTIMONY NOT WITHIN THE NARROW EXCEPTIONS IN RULE 606(B)..... 26

A. Rule 606(b) Preserves the Confidentiality of Jury Deliberations..... 29

B. Rule 606(b) Protects Jurors From Harassment..... 32

C. Rule 606(b) Protects the Finality of Jury Verdicts..... 34

CONCLUSION..... 36

TABLE OF AUTHORITIES

Cases

Carson v. Polley, 689 F.2d 562 (5th Cir. 1982) 12

Clark v. United States, 289 U.S. 1 (1933) 18, 19, 23, 29

Compton v. United States, 377 F.2d 408 (8th Cir. 1967) 9

Dorsey v. United States, --- U.S. ----, 132 S. Ct. 2321 (2012) 26

Grotemeyer v. Hickman, 393 F.3d 871 (9th Cir. 2004) 10

Hard v. Burlington Northern Railroad, 812 F.2d 482 (9th Cir. 1987) 20

Head v. Hargrave, 105 U.S. 45 (1881) 9

Irvin v. Dowd, 366 U.S. 717 (1961) 11

Jacob v. New York, 315 U.S. 752 (1943) 6

Jorgensen v. York Ice, 160 F.2d 432 (2d Cir. 1947) 11, 34

Lopez v. Aramark Uniform & Career Apparel, Inc., 417 F Supp. 2d 1062 (N.D. Iowa 2006) 22

Marquez v. City of Albuquerque, 399 F.3d 1216 (10th Cir. 2005) 21

Mattox v. United States, 146 U.S. 140 (1892) 8

McDonald v. Pless, 238 U.S. 264 (1915) 7, 27, 33

McDonough Power Equipment, Inc. v. Greenwood, 464 U.S. 548 (1984) ..... *passim*

Packet Co. v. Sickles, 5 Wall. 580 (1866) 7

Parker v. Gladden, 385 U.S. 363 (1966) 8

Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979) 6, 35, 36

People v. Brown, 399 N.E.2d 51 (N.Y. 1979) 20

Remmer v. United States, 347 U.S. 227 (1954) 8

Robles v Exxon, 862 F.2d 1201 (5th Cir. 1989) 15

Shillcutt v. Gagnon, 602 F. Supp. 1280 (E.D. Wis. 1985), *aff'd*, 827 F.2d 1155 (7th Cir. 1987) 15, 24, 30, 34

Smith v. Phillips, 455 U.S. 209 (1982) 8

Tanner v. United States, 483 U.S. 107 (1987) ..... *passim*

United States ex rel. Owen v. McMann, 435 F.2d 813 (2d Cir. 1970), *cert. denied*, 402 U.S. 906 (1971) 20, 21

United States v. Barraza, 655 F.3d 375 (5th Cir. 2011) 21

United States v. Benally, 546 F.3d 1230 (10th Cir. 2008), *cert. denied*, 558 U.S. 1051 (2009) 18, 19, 21

United States v. Duzac, 622 F.2d 911 (5th Cir. 1980) 12

United States v. Ebron, 683 F.3d 105 (5th Cir. 2012), *cert. denied*, --- U.S. ----, 134 S. Ct. 512 (2013) 24

United States v. Narciso, 446 F. Supp. 252 (E.D. Mich. 1977) 33

United States v. Navarro-Garcia, 926 F.2d 818 (9th Cir. 1991) 9, 11

United States v. Olano, 507 U.S. 725 (1993) 27

United States v. Reid, 53 U.S. (12 How.) 361 (1851) 8

United States v. Schwartz, 787 F.2d 257 (7th Cir. 1986) 33

United States v. Thomas, 116 F.3d 606 (2d Cir. 1997) 27

Vaise v. Delaval, 99 Eng. Rep. 944 (K.B. 1785) 7

Virts v. Bailey, 968 F.2d 1213 (table), 1992 WL 173887 (4th Cir. 1992) 27

Williams v. Price, 343 F.3d 223 (3d Cir. 2003) 7, 18

Wilson v. Vermont Castings, 977 F. Supp. 691 (M.D. Pa. 1997), *aff'd*, 170 F.3d 391 (3d Cir. 1999)..... 22

Witherspoon v. Illinois, 391 U.S. 510 (1968)..... 10

Woodward v. Alabama, --- U.S. ----, 134 S. Ct. 405 (2013)..... 10

Wyrosdick v. Southern Railway Co., 192 F Supp. 810 (E.D. Tenn. 1961)..... 28

Yeager v. United States, 557 U.S. 110 (2009) 7

Other Authorities

Annot., *Motion for New Trial as Suspension or Stay of Execution or Judgment*, 121 A.L.R. 686 (1939) 35

Arnold, Morris S., *The Civil Jury in Historical Perspective, in* The American Civil Jury (1987) 6

Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 Minn. L. Rev. 639 (1973)..... 36

Crump, Susan, *Jury Misconduct, Jury Interviews, and the Federal Rules of Evidence: Is the Broad Exclusionary Principal of Rule 606(b) Justified?*, 66 N.C. L. Rev. 509 (1988)..... 33

Diamond, Shari Seidman, *Beyond Fantasy and Nightmare: A Portrait of the Jury*, 54 Buff. L. Rev. 717 (2006)..... 11

Galanter, Marc, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. Empirical Legal Stud. 459 (2004) 31

H.R. Conf. Rep. No. 93-1597 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7102 14

H.R. Rep. No. 93-650 (1973), *reprinted in* 1974 U.S.C.C.A.N. 7051 13

Hans, Valerie P & Vidmar, Neil, *Judging the Jury* (1986) 10

Huebner, Benjamin T., *Beyond Tanner: An Alternative Framework for Postverdict Juror Testimony*, 81 N.Y.U. L. Rev. 1469 (2006) 7

Kairys, David, *et al.*, *Jury Representativeness: A Mandate for Multiple Source Lists*, 65 Cal. L. Rev. 776 (1977) 10

Kessler, Joan B., *The Social Psychology of Jury Deliberations*, *in* The Jury System in America (Rita J. Simon ed. 1975) 11

Letter from Dep't of Justice to Advisory Comm., *at* 117 Cong. Rec. 33655 (1971) 13

Marder, Nancy S., *Beyond Gender: Peremptory Challenges and the Roles of the Jury*, 73 Tex. L. Rev. 1041 (1995) 10

Marder, Nancy S., *Deliberations and Disclosures: A Study of Post-Verdict Interviews of Jurors*, 82 Iowa L. Rev. 465 (1997) 30, 31

O'Malley, Kevin F., *et al.*, *Federal Jury Practice and Instructions* (5th ed. 2000) 10

S. Rep. No. 93-1277 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7060 ..... 14, 29

Wigmore, John H., *To Ruin Jury Trial in the Federal Courts*, 19 Ill. L. Rev. 97 (1924) 32

Rules

Fed. R. Evid. 606(b) ..... *passim*

Fed. R. Evid. 606(b)(1) 3, 20

Tex. R. Civ. P. 226a 24

IDENTITY AND INTEREST OF *AMICUS CURIAE*

The American Association for Justice is a voluntary national bar association whose members primarily represent plaintiffs in personal injury actions, civil rights and employment rights cases, and business litigation. American Association for Justice members present their clients' cases before civil juries throughout the United States. The American Association for Justice is committed to the fundamental and constitutional right to trial by jury in civil cases.

The American Association for Justice is concerned that the broad new exception urged by Petitioner will undermine the jury right by destroying the confidentiality of deliberations, exposing jurors to pursuit and harassment long after they have completed their duties, and destroying the finality of litigation. These are precisely the reasons this Court and Congress have adhered to the general rule excluding such juror testimony. The American Association for Justice respectfully submits this brief as *amicus curiae* in support of the decision reached by the courts below.[1]

---

[1] Letters of consent by the parties to the filing of this *amicus curiae* brief have been filed with the Court. Pursuant to Rule 37.6, *amicus* discloses that no counsel for a party authored any part of this brief, nor did any person or entity other than *amicus*, its members, or counsel make a monetary contribution to its preparation.

SUMMARY OF ARGUMENT

1. The Question Presented in this case asks this Court to expand the admissibility of juror testimony under Federal Rule of Evidence 606(b) to include juror statements during deliberations that would show the reason for her vote and the effect of her statements on other jurors. History, the text of Rule 606(b), and compelling public policy strongly counsel against such a drastic expansion of judicial inquiry into jury deliberations.

The confidentiality of jury deliberations goes to the heart of the jury's constitutional role in our justice system. Juror misconduct is an inherent feature of the jury system. However, throughout our history this Court has consistently refused to allow jurors to impeach their verdict using statements made during deliberations in support of parties seeking a new trial. Although impartiality of the jury is important, this Court has also recognized that the general rule of inadmissibility also preserves the right to trial by jury by (1) protecting the confidentiality of deliberations, (2) shielding jurors from harassment by disappointed litigants, and (3) providing finality to litigation. This Court has balanced these competing interests by permitting juror testimony only to show that the jury was exposed to extraneous prejudicial information or to improper outside influences.

This rule permits the jury to carry out its valuable function of bringing the general knowledge, experience and common sense of the ordinary American to the evidence. Indeed, social science confirms that juries could not function without viewing the evidence in light of their own knowledge and experience.

In enacting Federal Rule of Evidence 606(b), Congress codified this Court's longstanding precedents by prohibiting jurors from testifying during an inquiry into the validity of their verdict "about any statement made or incident that occurred during the jury's deliberations; the effect of anything on that juror's or another juror's vote; or any juror's mental processes concerning the verdict " Fed. R. Evid. 606(b)(1). That is precisely the juror testimony that Petitioner proposes to permit in this case. Significantly, Congress rejected a version of the Rule that would have permitted juror testimony concerning "objective juror misconduct." Congress plainly did not intend to make juror testimony admissible to show juror dishonesty on voir dire.

2. The fact that Petitioner seeks a new trial on the basis of a juror's purported dishonesty on voir dire does not render Rule 606(b) inapplicable. *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548 (1984), sets forth the substantive requirements for a new trial due to juror dishonesty. Such a motion calls for an inquiry into the validity of the verdict and whether juror dishonesty may be shown through juror testimony remains subject to Rule 606(b).

Nor are the jury room statements by the purportedly dishonest juror "extraneous prejudicial information" admissible under the Rule. "Improper" must not be conflated with "extraneous." To construe the Rule so broadly would allow the exception to swallow the general rule entirely.

Additionally, Petitioner does not demonstrate that juror honesty on voir dire is at all enhanced by rewarding the losing litigant with a new trial while

visiting no adverse consequence upon the dishonest juror.

Trial judges have other tools at their disposal to promote honesty and impartiality, including imposing penalties on jurors who give intentionally dishonest answers on voir dire, instructing jurors on the need for impartiality and adherence to instructions, and instructing jurors to notify the court of juror misconduct before a verdict is reached.

3. Petitioner's proposal to broadly permit jurors to testify concerning statements during deliberations would undermine the strong policy reasons identified by Congress and this Court as the basis for excluding such testimony.

Permitting jurors to testify against other jurors in hearings into juror dishonesty will chill the full and frank discussion in the jury room which is essential to a healthy jury system. The fact that jurors in a relative few cases have given statements to the press, generally to defend their verdicts, does not diminish the harmful effects of Petitioner's proposal. In addition, admissibility of juror statements would make jurors vulnerable to manipulation or corrupting influence of losing parties, and diminish the public's high regard for the jury system.

Permitting parties to obtain new trials on the basis of juror testimony concerning deliberations would also make jurors the targets of harassment by litigants on both sides seeking to impeach or defend the verdict. It is likely that court rules and ethical considerations that currently restrict contact with former jurors would be relaxed, increasing public dissatisfaction with jury service.

The proposed rule would undermine the finality of the litigation process by enmeshing courts in protracted efforts to overturn verdicts based on misconduct during deliberations.

The Seventh Amendment right to trial by jury may be eroded if not jealously guarded by this Court. The dramatic and unprecedented intrusion into the jury's deliberative process proposed by Petitioner represents a serious threat to that right. The fact that it is proposed in the name of impartiality does not lessen the harm to this fundamental right.

ARGUMENT

I. HISTORY, THE TEXT OF FEDERAL RULE OF EVIDENCE €06(B), AND COMPELLING PUBLIC POLICY COUNSEL AGAINST PETITIONER'S PROPOSAL TO EXPAND JUDICIAL INQUIRY INTO JURY DELIBERATIONS.

A. This Court Has Jealously Guarded the Jury Right by Crafting a Rule That Carefully Balances the Need to Protect the Jurors' Internal Motives and Decisionmaking With the Need to Provide a Fair and Impartial Jury.

1. Historically this Court has permitted juror testimony regarding deliberations only to show extraneous information or outside influence affecting the jury.

"The right of trial by jury in civil cases," then Justice William Rehnquist declared, "is fundamental to our history and jurisprudence." *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 338 (1979) (Rehnquist, J., dissenting). As Judge Arnold observed: "It is almost impossible to exaggerate the centrality of the institution of the jury It is the single most important institution in the history of Anglo-American law." Morris S. Arnold, *The Civil Jury in Historical Perspective*, *in* The American Civil Jury 9, 10 (1987). Consequently, this Court has emphasized, the "right of jury trial in civil cases at common law should be jealously guarded by the courts." *Jacob v. New York*, 315 U.S. 752, 753 (1943).

The Question Presented in this case goes to the very heart of the jury's constitutional role. Petitioner contends that drastic expansion of judicial inquiry into a jury's deliberations is essential to assuring the truthfulness of prospective jurors on voir dire, which, in turn, protects the civil litigant's right to an impartial jury. Pet'r's Br. 19.

However, as the history of the rule excluding juror testimony makes clear, impartiality—though vitally important—is not the only value at stake when such testimony is proffered to obtain a new trial. Throughout our history, there has been juror misconduct. "In a system without professional jurors, it is inevitable that some jurors will act

unprofessionally on occasion. Varieties of juror misconduct run the gamut of human weakness," and include "lying or otherwise misleading the court during voir dire." Benjamin T. Huebner, *Beyond Tanner: An Alternative Framework for Postverdict Juror Testimony*, 81 N.Y.U. L. Rev. 1469, 1469-70 (2006).

Yet throughout our history, courts have held that jurors may not be heard to impeach their verdict with testimony regarding misconduct in the jury room. This broad rule of exclusion may be traced to Lord Mansfield's decision in *Vaise v. Delaval*, 99 Eng. Rep. 944 (K.B. 1785), rejecting juror testimony that the jury reached its decision by casting lots. *See Williams v. Price*, 343 F.3d 223, 232 (3d Cir. 2003) (Alito, J.). Much more recently, this Court restated the principle that "[t]he jury's deliberations are secret and not subject to outside examination." *Yeager v. United States*, 557 U.S. 110, 122 (2009). The Court cited *Vaise*, as well as this Court's decision in *Packet Co. v. Sickles*, 5 Wall. 580 (1866), wherein the Court stated that the testimony of jurors as to "the secret deliberations of the jury, or grounds of their proceedings while engaged in making up their verdict" was "not competent or admissible evidence." *Id.* at 593.

The rationale for the rule in this country was not Lord Mansfield's but this Court's. The general rule excluding juror testimony is essential to preserving the right to trial by jury by (1) protecting the confidentiality of deliberations, (2) shielding jurors from harassment by disappointed litigants, and (3) providing finality to litigation. *McDonald v. Pless*, 238 U.S. 264, 267-68 (1915).

This Court has consistently adhered to these policies and has fashioned exceptions in only two circumstances. The Court has permitted juror testimony to show that prejudicial information not in evidence was introduced during the deliberations. *See, e.g., Mattox v. United States*, 146 U.S. 140, 151 (1892) (juror brought newspaper into jury room); *United States v. Reid*, 53 U.S. (12 How.) 361, 366 (1851), *overruled on other grounds* (newspaper in jury room). The Court has also permitted inquiry into jurors' contacts with outsiders who might have influenced the verdict in the case. *See, e.g., Smith v. Phillips*, 455 U.S. 209, 215 (1982) (juror in criminal trial had applied for a job at the District Attorney's office); *Parker v. Gladden*, 385 U.S. 363, 365 (1966) (bailiff's comments to jurors about defendant); *Remmer v. United States*, 347 U.S. 227, 228-30 (1954) (bribe offered to juror); *Mattox*, 146 U.S. at 150 (bailiff's statement that the defendant was about to be tried for another murder). *See also Tanner v. United States*, 483 U.S. 107, 117 (1987) ("Exceptions to the common-law rule were recognized only in situations in which an 'extraneous influence,' was alleged to have affected the jury." (citation omitted)).

2. The secrecy of juror deliberations protects the jurors' essential function of bringing their own general knowledge and experience to bear on the evidence.

It is an advantage of our jury system that jurors chosen from the community can be expected to bring their generalized knowledge, life experiences, and "common sense" to bear on the factual questions they must decide. As this Court long ago stated:

> So far from laying aside their own general knowledge and ideas, the jury should have applied that knowledge and those ideas to the matters of fact in evidence in determining the weight to be given to the opinions expressed; and it was only in that way that they could arrive at a just conclusion.

Head v. Hargrave, 105 U.S. 45, 49 (1881).

That principle has remained an essential feature of the jury system. *See United States v. Navarro-Garcia*, 926 F.2d 818, 821 (9th Cir. 1991) ("Inevitably, '[j]urors must rely on their past personal experiences when hearing a trial and deliberating on a verdict.'"(internal citation omitted)); *Compton v. United States*, 377 F.2d 408, 412 (8th Cir. 1967) ("[A] juror has not only a right but a duty to use his common sense and experience and draw all reasonable inferences from the physical facts.").

Indeed, the federal pattern jury instructions inform juries:

> You are to base your verdict only on the evidence received in the case. In your consideration of the evidence received, however, you are not limited to the bald statements of the witnesses or to the bald assertions in the exhibits. You are permitted to draw from the facts which you find have been proved such reasonable inferences as you feel are justified *in the light of your experience and common sense.*

Grotemeyer v. Hickman, 393 F.3d 871, 879 (9th Cir. 2004) (emphasis added) (quoting 1A Kevin F O'Malley, Jay E. Grenig & William C. Lee, *Federal Jury Practice and Instructions* § 12.03 (5th ed. 2000)).

This principle also finds expression in capital criminal cases where jurors "express the conscience of the community on the ultimate question of life or death." *Witherspoon v. Illinois*, 391 U.S. 510, 519 (1968); *Woodward v. Alabama*, --- U.S. ----, 134 S. Ct. 405 (2013).

Indeed, modern social science shows that juries cannot be expected to behave otherwise. Humans naturally interpret new facts and information by comparing them with prior knowledge and experience. *See, e.g.*, Nancy S. Marder, *Beyond Gender: Peremptory Challenges and the Roles of the Jury*, 73 Tex. L. Rev. 1041, 1130 (1995) ("[J]urors have different experiences and perspectives that shape the way in which they view the world."); Valerie P. Hans & Neil Vidmar, *Judging the Jury* 50 (1986) ("[A] jury composed of individuals with a wide range of experiences, backgrounds, and knowledge is more likely to perceive the facts from different perspectives and thus engage in a vigorous and thorough debate."); David Kairys, *et al.*, *Jury Representativeness: A Mandate for Multiple Source Lists*, 65 Cal. L. Rev. 776, 782 n.44 (1977) ("No one is without attitudes and preferences concerning various social, political, economic, cultural and religious issues, and such attitudes and preferences affect one's judgment and perception regarding factual and legal questions and the credibility of witnesses.").

Post-trial interviews with jurors suggest that disagreement among jurors on the first ballot is the

rule rather than the exception, strongly suggesting that individual jurors view the same evidence through the prism of their own prior knowledge and experiences. Shari Seidman Diamond, *Beyond Fantasy and Nightmare: A Portrait of the Jury*, 54 Buff. L. Rev. 717, 737 (2006). According to another researcher, "'50% of the jurors' time [is] spent discussing personal experiences.'" *Navarro-Garcia*, 926 F.2d at 821 (quoting Joan B. Kessler, *The Social Psychology of Jury Deliberations, in The Jury System in America* 69, 83 (Rita J. Simon ed. 1975).

Personal experiences, of course, can also give rise to personal misconceptions and biases. However, as Judge Learned Hand pragmatically observed, it would be impossible to eliminate the effects of such bias without eliminating the jury system itself:

> [I]t would be impracticable to impose the counsel of absolute perfection that no verdict shall stand, unless every juror has been entirely without bias, and has based his vote only upon evidence he has heard in court. Like much else in human affairs, its defects are so deeply enmeshed in the system that wholly to disentangle them would quite kill it.

Jorgensen v. York Ice, 160 F.2d 432, 435 (2d Cir. 1947). This Court adopted the same pragmatic view in *Irvin v. Dowd*, 366 U.S. 717 (1961): "To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard." *Id.* at 723.

For that reason, federal courts have held that, "Although the jury is obligated to decide the case solely on the evidence, its verdict may not be disturbed if it is later learned that personal prejudices were not put aside during deliberations." *United States v. Duzac*, 622 F.2d 911, 913 (5th Cir. 1980). *See also Carson v. Polley*, 689 F.2d 562, 581 (5th Cir. 1982) ("possible subjective prejudices or improper motives of individual jurors" are beyond the scope of inquiry on a motion for a new trial for jury misconduct).

Thus, although courts have recognized the importance of impartiality of jurors, they also recognize that our system in which ordinary citizens are called upon to play a vital role in the administration of justice could not long exist if every verdict that was affected by a juror's personal views required retrial.

B. Rule 606(b) Strikes the Appropriate Balance by Excluding Testimony Regarding Jurors' Mental Processes in Proceedings Seeking to Overturn Their Verdict While Allowing Testimony That Reveals the Jury's Exposure to Extraneous Prejudicial Information and Improper Outside Influences.

In 1972, after 14 years of intensive study by judges, practicing attorneys, and academics, this Court promulgated a set of uniform rules of evidence for the federal courts. Proposed Rule 6-06 essentially codified this Court's longstanding precedents on the subject of the inadmissibility of juror testimony to impeach the jury's verdict. In 1975, Congress enacted the Federal Rules of Evidence into law. Rule 606(b) as

enacted by Congress was the rule this Court proposed: juror testimony concerning their deliberations is broadly prohibited except to determine "whether extraneous prejudicial information was improperly brought to the jury's attention" or to determine "whether any outside influence was improperly brought to bear upon any juror." Fed. R. Evid. 606(b). Congress intended no broader exception and no broader exception should be implied. Indeed, Congress specifically rejected an amended version of the rule that would have opened the door to the type of juror testimony Petitioner asks this Court to permit.

In 1972, the House rejected this Court's promulgated Rule 6-06 and adopted a version that was based on an earlier Advisory Committee proposal. That version was more permissive of juror testimony in one important respect. The House version maintained the well-settled prohibition of juror testimony concerning the mental processes of the jurors. But it would have allowed testimony not only concerning extraneous information or outside influences, but also "objective juror misconduct." H.R. Rep. No. 93-650, at 9-10 (1973), *reprinted in* 1974 U.S.C.C.A.N. 7051, 7083. The Department of Justice voiced its opposition to that proposal. *See* Letter from Dep't of Justice to Advisory Comm., *at* 117 Cong. Rec. 33655 (1971) (arguing that "[s]trong policy considerations continue to support the rule that jurors should not be permitted to testify about what occurred during the course of their deliberations").

The Senate Judiciary Committee sharply criticized the House expansion of the admissibility of juror testimony. "Although forbidding the impeachment of verdicts by inquiry into the jurors'

mental processes, it deletes from the Supreme Court version the proscription against testimony 'as to any matter or statement occurring during the course of the jury's deliberations.' This deletion would have the effect of opening verdicts up to challenge *on the basis of what happened during the jury's internal deliberations, for example, where a juror alleged that the jury refused to follow the trial judge's instructions* or that some of the jurors did not take part in deliberations." S. Rep. No. 93-1277, at 13-14 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7060 (emphasis added).

The Conference Committee Report agreed with the Senate Committee criticism: "[T]he House bill allows a juror to testify about objective matters occurring during the jury's deliberation, *such as the misconduct of another juror* or the reaching of a quotient verdict." H.R. Conf. Rep. No. 93-1597, at 8 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7102. "The Conference Committee adopted, and Congress enacted, the Senate version." *Tanner*, 483 U.S. at 125. *See also* Advisory Comm. Note, Rule 606(b), "1974 Enactment." The Rule currently provides:

> **Rule 606: Juror's Competency As A Witness**
>
> (b) During an Inquiry into the Validity of a Verdict or Indictment.
>
> (1) Prohibited Testimony or Other Evidence. During an inquiry into the validity of a verdict or indictment, a juror may not testify about any statement made or incident that occurred during the jury's deliberations; the effect of

> anything on that juror's or another juror's vote; or any juror's mental processes concerning the verdict or indictment. The court may not receive a juror's affidavit or evidence of a juror's statement on these matters.
>
> (2) Exceptions. A juror may testify about whether:
>
> (A) extraneous prejudicial information was improperly brought to the jury's attention;
>
> (B) an outside influence was improperly brought to bear on any juror; or
>
> (C) a mistake was made in entering the verdict on the verdict form.

As the Fifth Circuit observed, "the legislative history of the rule unmistakably points to the conclusion that Congress made a conscious decision to disallow juror testimony as to the jurors' mental processes or fidelity to the court's instructions." *Robles v Exxon*, 862 F.2d 1201, 1205 (5th Cir. 1989). Consequently, "Rule 606(b) represents a judgment that exposure of the deliberative process would cause an even greater injustice by removing protections vital to the effective functioning of the jury system, thereby infringing everyone's constitutional right to trial by jury." *Shillcutt v. Gagnon*, 602 F Supp. 1280, 1281 (E.D. Wis. 1985), *aff'd*, 827 F.2d 1155 (7th Cir. 1987).

This Court should not engraft onto Rule 606(b) an exception that Congress itself has rejected.

II. THERE IS NO NEED TO DEVISE A SPECIAL EXCEPTION TO RULE 606(b) FOR *MCDONOUGH* NEW TRIAL MOTIONS BASED ON JUROR DISHONESTY DURING VOIR DIRE.

A. *McDonough* Provides Ground for a New Trial Based on Juror Dishonesty on Voir Dire, But the Admissibility of Juror Testimony to Establish Juror Dishonesty Remains Subject to Federal Rule of Evidence 606(b).

1. *McDonough* does not provide for the admissibility of juror testimony to establish dishonesty on voir dire, and so is subject to Rule 606(b).

Petitioner argues that juror testimony regarding the deliberations in this case should be admissible in support of his new trial motion based on *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548 (1984). Pet'r's Br. 19. In *McDonough*, this Court held that a litigant may be entitled to a new trial by showing that a juror (1) gave intentionally false information on voir dire, (2) in response to a material question, and (3) that if the juror had given a truthful answer, the juror would have been dismissed for cause. *Id.* at 555.

McDonough states the grounds for a new trial based on juror dishonesty; it does not suggest that the losing litigant may rely on statements made during

deliberations to establish such dishonesty.[2] Petitioner contends that Rule 606(b) does not apply to *McDonough* motions for new trial because the juror affidavit is not offered for the purpose of impeaching the jury's verdict. Rather, Petitioner contends that he offered the affidavit of juror Titus simply to show that juror Whipple answered dishonestly during voir dire. Pet'r's Br. 21-22.

The crux of Petitioner's argument that Rule 606(b) does not govern *McDonough* inquiries is as follows:

> To be sure, the result of a successful *McDonough* claim is that the moving party is entitled to vacatur of the judgment and a new trial. But a new trial is simply a *remedy* for a *McDonough* error. Put another way, the availability of a new-trial remedy once the inquiry has been completed hardly transforms the inquiry into juror dishonesty during voir dire into an inquiry into the validity of the verdict.

Pet'r's Br. 21-22.

Amicus respectfully submits that the inquiry Petitioner proposes—to show by juror Whipple's statements during deliberations that she voted for the defense based on her views derived from her daughter's accident rather than the evidence and

---

[2] In this case, for example, it is likely that Petitioner could have established that juror Whipple's daughter had been involved in a fatal auto accident through police reports or news accounts, which would not be barred by Rule 606(b).

persuaded other jurors to decide on that basis as well—is indeed an inquiry into the validity of the jury's verdict.

The Tenth Circuit has persuasively rejected the exact argument Petitioner raises here:

> Although the immediate purpose of introducing the testimony may have been to show that the two jurors failed to answer honestly during voir dire, the sole point of this showing was to support a motion to vacate the verdict, and for a new trial. That is a challenge to the validity of the verdict.

United States v. Benally, 546 F.3d 1230, 1235 (10th Cir. 2008), *cert. denied*, 558 U.S. 1051 (2009). The Tenth Circuit adopted the position set forth in *Williams v. Price*, 343 F.3d 223, 235-37 (3d Cir. 2003) (Alito, J.), excluding such juror testimony, as the approach that "best comports with Rule 606(b)."546 F.3d at 1236.

Petitioner's lengthy discussion of *Clark v. United States*, 289 U.S. 1 (1933) does not alter this result. *See* Pet'r's Br. 25-30. In that case, this Court held that juror testimony tending to show that a juror lied on voir dire may be introduced at the dishonest juror's trial on charges of contempt. Because the court was not inquiring into the validity of the verdict in the underlying case, the rule precluding jurors from impeaching their verdict did not apply. Consequently, as the Tenth Circuit correctly stated,

> [I]f the purpose of the post-verdict proceeding were to charge the jury foreman or the other juror with contempt

> of court, Rule 606(b) would not apply. However, it does not follow that juror testimony that shows a failure to answer honestly during voir dire can be used to overturn the verdict.

Benally, 546 F.3d at 1235 (internal citation omitted).

Contrary to Petitioner's view, *see* Pet'r's Br. 30, the admissibility of such evidence when offered to impeach the jury's verdict is governed by Rule 606(b), not by *Clark*.

2. Testimony concerning a juror's statements during deliberations which may indicate dishonesty on voir dire and the effect on other jurors is not evidence of "extraneous prejudicial information."

Petitioner argues, alternatively, that this Court should hold "that evidence that tends to show juror dishonesty during voir dire is admissible under Rule 606(b)(2)(a)," which allows juror testimony to show that "extraneous prejudicial information was improperly brought to the jury's attention." Pet'r's Br. 46. Petitioner contends that if Juror Whipple had revealed her daughter's accident and her views against awarding damages she would have been dismissed for cause and so the statement would never have been made during deliberations. On that basis, Petitioner contends, Juror Whipple's statements during deliberations must be deemed both extraneous and prejudicial. *Id.* at 46-47.

It is clear that Juror Titus' affidavit, even as construed by Petitioner, is proffered to show the reason why Juror Whipple voted for the defense, that this reason was based on her own personal experience, and that other jurors were persuaded to vote for the defense for the same reason. To argue that these motives, biases, and mental processes are "extraneous" would allow the exception to swallow up the general rule that "a juror may not testify about . . the effect of anything on that juror's or another juror's vote; or any juror's mental processes concerning the verdict." Fed. R. Evid. 606(b)(1).

A juror's personal knowledge constitutes extraneous prejudicial information where the juror has personal knowledge regarding the parties or issues involved in the litigation. *Hard v. Burlington N. R.R.*, 812 F.2d 482, 486 (9th Cir. 1987). In that case, the court held that a juror who was a railroad worker gave extraneous information to the jury by describing Burlington's settlement practices. *Id.* at 485. *See also People v. Brown*, 399 N.E.2d 51, 52, 54 (N.Y. 1979) (finding misconduct where juror drove to crime site to test defense theory and shared results with other jurors).

In *United States ex rel. Owen v. McMann*, 435 F.2d 813 (2d Cir. 1970), *cert. denied*, 402 U.S. 906 (1971), Judge Friendly provided a thorough discussion of when statements by jurors regarding their personal knowledge may invalidate a verdict:

> [T]he inquiry is not whether the jurors "became witnesses" in the sense that they discussed *any* matters not of record but whether they discussed specific extra-record facts relating to the

> defendant, and if they did, whether there was a significant possibility that the defendant was prejudiced thereby.

*Id.*at 818 n.5 (emphasis added).

As Justice O'Connor pointed out in *Tanner*, Rule 606(b) expressly categorizes the effect of anything upon the "mind or emotions" as internal mental processes, and not extraneous information or an outside influence. 483 U.S. at 138.

For that reason, courts have held that the personal views of jurors, even if improper, are not "extraneous prejudicial information" for purposes of Rule 606(b). Thus jurors' statements regarding their personal experiences with Native Americans and their preconception that all Native Americans got drunk and then violent were entirely improper and inappropriate but did not come within the exception for extraneous prejudicial information. *Benally*, 546 F.3d at 1238 ("improper" must not be conflated with "extraneous"). Similarly, a juror's statements during deliberations that men with power always make sexual advances and that she had been sexually harassed at her place of employment were not extraneous information or outside influences, but emotions that influenced the juror and part of her mental processes. Such statements communicating "a generalized prejudice," are not within the exceptions to Rule 606(b). *United States v. Barraza*, 655 F.3d 375, 380 (5th Cir. 2011). *See also Marquez v. City of Albuquerque*, 399 F.3d 1216, 1223 (10th Cir. 2005) (Juror's personal experience with training police dogs was not "extraneous prejudicial information," for purposes of impeaching verdict that officer's use of a police dog constituted excessive force); *Lopez v.*

Aramark Uniform & Career Apparel, Inc., 417 F. Supp. 2d 1062, 1072 (N.D. Iowa 2006) (Two jurors' prior personal experiences with sexual abuse did not constitute "extraneous prejudicial information," in deliberations sexual harassment suit against former employer); *Wilson v. Vermont Castings*, 977 F. Supp. 691, 695 (M.D. Pa. 1997), *aff'd*, 170 F.3d 391 (3d Cir. 1999) (In products liability action against manufacturer of woodburning stove, juror's statements during deliberation regarding how she routinely operated her stove were not extraneous information. "Jurors bring with them to deliberations their life experiences. When such information becomes part of the deliberative process, it becomes sacrosanct under Rule 606(b).").

B. There Are Other Means to Protect the Impartiality of Jurors Short of Ordering a New Trial for Dishonesty on Voir Dire.

Petitioner contends that it is necessary to admit juror testimony concerning deliberations for the purpose of demonstrating juror dishonesty on voir dire. If voir dire is to serve its purpose of safeguarding the litigant's constitutional right to an impartial jury, Petitioner argues, "it is obviously necessary that prospective jurors give truthful answers." Pet'r's Br. 18-19.

The importance of honesty is beyond dispute. It is not so clear that overturning the jury's verdict and requiring the parties to retry their case is the only means of promoting voir dire honesty.

Similarly the Brief for *Amici Curiae* Professors of Law in Support of Petitioners ("Professors' Amici

Br.") devotes considerable discussion of the right to an impartial jury and the role of voir dire in protecting that right. Professors' Amici Br. 10-16. The professors urge this Court to hold juror testimony concerning deliberations admissible, despite the plain text of Rule 606(b), stating that precluding such juror testimony would undermine the voir dire process. *Id* at 31.

Both Petitioner and supporting amici misstate the question before to this Court. The question is not whether juror testimony may be admissible to show juror dishonesty. Such testimony is clearly permissible at a proceeding to punish the dishonest juror. *Clark*, 289 U.S. at 17. The question before this Court is whether under Rule 606(b) a losing party may use such testimony to obtain a new trial.

It is not self-evident that ordering a new trial on the basis of a juror's report of what occurred during deliberations is the only way—or even an effective way—to foster honesty during voir dire. Under the expanded admissibility Petitioner advocates, the offending juror would suffer no consequence for dishonesty. Indeed, a juror who is unhappy with the result, or for any reason, would be empowered to undo the work of the majority. In addition, the losing litigant would profit by eliminating an adverse jury verdict. It requires little imagination to point out the obvious incentive for parties with a great deal at stake to game the system and seek out possibly dissatisfied jurors.

Additionally, courts have at their disposal a variety of tools designed to ensure impartial decisionmaking by jurors. One, of course, is to instruct the jury on the importance of resisting bias and deciding the matters before them solely on the

evidence. In addition, some courts instruct jurors to advise the court of conduct in the jury room that may violate the court's instructions. *See, e.g.*, Tex. R. Civ. P. 226a (requiring judges to instruct jurors to report acts of juror misconduct to judge). As Petitioner acknowledges, Rule 606(b) does not preclude a juror from disclosing to the judge prior to verdict misconduct by another juror during deliberations. Pet'r's Br. 41. The trial judge can then take appropriate action.[3]

As one district court has stated:

> In order to preserve the jury system, the technique proposed by the petitioner must be rejected in favor of systematic safeguards against prejudice such as voir dire, the juror's oath, and the court's instruction which directs the jury to consider only the evidence and to reject arguments based on prejudice. While not infallible, these checks minimize prejudice without undermining the integrity of the jury system.

Shillcutt, 602 F. Supp. at 1283.

In *McDonough* itself, this Court rejected the contention that a new trial be awarded to every losing

---

[3] For example in *United States v. Ebron*, 683 F.3d 105 (5th Cir. 2012), *cert. denied*, --- U.S. ----, 134 S. Ct. 512 (2013), after the foreperson informed the trial judge that juror Johnson refused to follow the court's instructions during deliberations, the judge questioned the other jurors and concluded that Johnson was improperly bringing her personal feelings to the case. *Id.* at 123. The judge replaced Johnson with an alternate and the jury proceeded to return a verdict. *Id.*

litigant who can demonstrate that a juror answered dishonestly on voir dire:

> This Court has long held that "'[a litigant] is entitled to a fair trial but not a perfect one,' for there are no perfect trials." .Trials are costly, not only for the parties, but also for the jurors performing their civic duty and for society which pays the judges and support personnel who manage the trials. It seems doubtful that our judicial system would have the resources to provide litigants with perfect trials, were they possible, and still keep abreast of its constantly increasing case load.

464 U.S. at 553 (internal citations omitted).

In sum, the fact that Petitioner's motion for a new trial is based on the type of juror dishonesty referred to in *McDonough* does not require the admissibility of juror testimony regarding deliberations. Rule 606(b) governs such new trial motions and the juror dishonesty in this case does not involve extraneous information or outside influence. Moreover, there are other less drastic tools available to courts to promote impartial decisionmaking by civil juries.[4]

---

[4] Petitioner also urges this Court to permit the inquiry into jury deliberations, despite the plain text of Rule 606(b) under the doctrine of "constitutional avoidance," contending that in criminal cases, "refusing to allow questioning about racial bias in certain circumstances" would "violate[] both the specific Sixth Amendment jury trial right and the broader constitutional right to due process." Pet'r's Br. 38.

III. STRONG POLICY REASONS COUNSEL AGAINST PERMITTING LITIGANTS TO INTRODUCE JUROR TESTIMONY NOT WITHIN THE NARROW EXCEPTIONS IN RULE 606(B).

In enacting Rule 606(b), Congress chose a lesser evil. As this Court observed, "There is little doubt that postverdict investigation into juror misconduct would in some instances lead to the invalidation of verdicts reached after irresponsible or improper juror behavior. It is not at all clear, however, that the jury system could survive such efforts to perfect it." *Tanner*, 483 U.S. at 120. Congress determined that the possible prejudice to a litigant due to juror misconduct was far outweighed by the greater danger to the administration of justice and to the institution of the jury. This Court enunciated those dangers in detail almost a century ago:

> [L]et it once be established that verdicts solemnly made and publicly returned into court can be attacked and set aside on the testimony of those who took part

---

This is not the case for this Court to prescribe the application of Rule 606(b) in cases where a criminal defendant proffers juror testimony indicating that racial bias affected jury deliberations. In the appropriate case, this Court may hold that the Sixth Amendment and due process require that a criminal defendant be permitted to seek a new trial based on such evidence. Such a possibility does not require this Court's to hold in this case that Rule 606(b) must permit testimony regarding a juror's personal opinions unrelated to racial prejudice in a civil case. "There is thus no constitutional doubt triggered by" the interpretation of Rule 606(b) in this civil case according to its terms. *Dorsey v. United States*, --- U.S. ----, 132 S. Ct. 2321, 2344 (2012) (Scalia, J., dissenting).

> in their publication and all verdicts could be, and many would be, followed by an inquiry in the hope of discovering something which might invalidate the finding. Jurors would be harassed and beset by the defeated party in an effort to secure from them evidence of facts which might establish misconduct sufficient to set aside a verdict. If evidence thus secured could be thus used, the result would be to make what was intended to be a private deliberation, the constant subject of public investigation; to the destruction of all frankness and freedom of discussion and conference.

McDonald, 238 U.S. at 267-68.

Those policy reasons for the rule—confidentiality of deliberations, prevention of harassment of jurors, and the finality of verdicts—worthy objectives in themselves, are essential to preserving the constitutional right to trial by jury that the Founders so valued. *See United States v. Olano*, 507 U.S. 725, 737 (1993) (stating the "cardinal principle that the deliberations of the jury shall remain private and secret"); *United States v. Thomas*, 116 F.3d 606, 618 (2d Cir. 1997) ("The secrecy of deliberations is the cornerstone of the modern Anglo-American jury system. Indeed, courts and commentators alike recognize that the secrecy of deliberations is essential to the proper functioning of juries."); *Virts v. Bailey*, 968 F.2d 1213 (table), 1992 WL 173887, at *6 (4th Cir. 1992) (accepting juror affidavits in support of new trial motions would encourage post-verdict questioning of jurors, which "undermines the vital role the jury system plays in our

judicial framework."); *Wyrosdick v. Southern Ry. Co.*, 192 F. Supp. 810, 812 (E.D. Tenn. 1961) ("The importance of protecting the secrecy of the deliberations of the jury and of protecting the jurors from inquisitions after they have rendered their verdict is necessary to the preservation of a sound jury system.").

The policies enunciated in *McDonald* are the same policies Congress had in mind in enacting Rule 606(b). As noted earlier, the House had passed a version of Rule 606(b) that would have allowed testimony as to objective juror misconduct. Congress rejected the broader bill. The Senate Judiciary Committee explained:

> The [House version] would permit the harassment of former jurors by losing parties as well as the possible exploitation of disgruntled or otherwise badly-motivated ex-jurors.
>
> Public policy requires a finality to litigation. And common fairness requires that absolute privacy be preserved for jurors to engage in the full and free debate necessary to the attainment of just verdicts. Jurors will not be able to function effectively if their deliberations are to be scrutinized in post-trial litigation. In the interest of protecting the jury system and the citizens who make it work, rule 606 should not permit any inquiry into the internal deliberations of the jurors.

S. Rep. No. 93-1277, at 13-14 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7060. Similarly, the Advisory Committee restated the same policy foundation for the Rule: "The values sought to be promoted by excluding the evidence include freedom of deliberation, stability and finality of verdicts, and protection of jurors against annoyance and embarrassment." Advisory Comm. Note, Rule 606(b), "1972 Proposed Rule." *See also Tanner*, 483 U.S. at 120-21.

Petitioner recognizes the importance of these objectives but denies that permitting jurors to testify at a hearing to overturn their verdict would contravene those policies. Pet'r's Br 40. Amicus submits instead that each of those policies would be undermined, threatening the vitality of the Seventh Amendment right to trial by jury.

A. Rule 606(b) Preserves the Confidentiality of Jury Deliberations.

This Court has made clear that, "full and frank discussion in the jury room, jurors' willingness to return an unpopular verdict, and the community's trust in a system that relies on the decisions of laypeople would all be undermined by a barrage of postverdict scrutiny of juror conduct." *Tanner*, 483 U.S. at 120-21. Justice Cardozo, speaking for a unanimous Court in *Clark v. United States*, 289 U.S. 1 (1933), stated, "Freedom of debate might be stifled and independence of thought checked if jurors were made to feel that their arguments and ballots were to be freely published to the world." *Id.* at 13.

Moreover, as one district court has warned, if the door to the jury room is opened, it shall be opened wide:

> Jurors would be inhibited during deliberations by the knowledge that their statements might be disclosed to the public by a fellow juror. The exposure of statements made during deliberations would be commonplace since, if courts were to recognize a party's right to prejudice-free deliberations, the law would also have to allow all parties an equal opportunity to vindicate the right. Restrictions on attorney-juror contact imposed by this and other district courts would presumably be improper.

Shillcutt, 602 F. Supp. at 1282.

Petitioner seeks to minimize the impact of his proposal to broaden the admissibility of jury deliberations, stating that jurors nowadays often speak to the press and therefore no longer have a reasonable expectation that their deliberations shall remain private. Pet'r's Br. 40-41 (citing Nancy S. Marder, *Deliberations and Disclosures: A Study of Post-Verdict Interviews of Jurors*, 82 Iowa L. Rev. 465 (1997)). That study, however, found quite the opposite. First, the author found that "a LEXIS search of major newspapers and magazines from 1980 to 1995 revealed numerous high-profile cases and yielded fifty-two articles in which jurors were interviewed after the verdict." *Id.* at 476. There were well over one million state and federal jury trials

during that period.[5] Fifty-two instances of juror statements to the press hardly supports Petitioner's claim that "jurors routinely grant interviews to journalists." Pet'r's Br. 40. Indeed, Professor Marder suggested that "the relatively small number of jurors who speak to the press may indicate that jurors are not under pressure to speak, and post-verdict interviews should not be a cause for concern." 2 Iowa L. Rev. at 476-77.[6]

More importantly, in the great majority of those 52 instances, the juror(s) spoke to the press not to undermine the jury's verdict, but to support the outcome and "set the record straight" in the face of public criticism. *Id.* at 477. In 95 percent of the press accounts, the jurors defended their verdict as based on the evidence and in obedience to the courts' instructions. *Id.* This is wholly unlike Petitioner's proposal that individual jurors be made the subject of a hearing and, in effect, be put on trial on charges of

---

[5] The number of jury trials during that period may be estimated from data in Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. Empirical Legal Stud. 459 (2004). The number of civil jury trials during 1980 to 1995 in the courts of general jurisdiction of 21 states (and the District of Columbia) that contain 58 percent of the U.S. population totaled 375,731. *Id.* at 507, tbl.4. The total number of state court criminal jury trials during that period was 668,845. *Id.* at 512, tbl.7. In addition, the number of federal civil and criminal trials averaged roughly 8,000 per year. *Id.* at 461-62,tbl.1 (Civil jury trials) & 493-94 & tbl.24 (Criminal jury trials).

[6] The author's concern was not that many jurors are revealing secret deliberations, but rather that the "limited number of vocal jurors may be playing a disproportionately large role in shaping public perception of jury deliberations." *Id.* at 477.

lying to the court. Such a prospect would surely chill the "full and frank discussion in the jury room." *Tanner*, 483 U.S. at 120.

The confidentiality of jury deliberations serves not only to foster frank discussion inside the jury room, but also to safeguard "the community's trust in a system that relies on the decisions of laypeople for judicial process." *Id.* at 121.

As Dean Wigmore has pointed out, the juries have remained remarkably free from corruption due to their relative anonymity and transience. Jurors "are selected at the last moment from the multitude of citizens. They cannot be known beforehand, and they melt back into the multitude after each trial." John H. Wigmore, *To Ruin Jury Trial in the Federal Courts*, 19 Ill. L. Rev. 97, 98 (1924).

If, however, losing litigants become entitled to seek a new trial based on jurors' reports of statements made during deliberations, they will have a strong incentive to locate and persuade jurors to come forward to make such reports. The party opposing the motion will be equally incentivized to locate and persuade other jurors to support the opposing version of events. The result would not make juries more impartial, but make jurors more "accessible to the arts of corruption and chicanery." *Id.*

B. Rule 606(b) Protects Jurors From Harassment.

This Court has also taken seriously the prospect that, if Petitioner's proposal were adopted, jurors "would be harassed and beset by the defeated party in an effort to secure from them evidence of facts which might establish misconduct sufficient to set

aside a verdict." *McDonald*, 238 U.S. at 267. Rule 606(b) was designed "to protect the jurors from being pestered by lawyers." *United States v. Schwartz*, 787 F.2d 257, 261-62 (7th Cir. 1986). *See also United States v. Narciso*, 446 F Supp. 252, 324 (E.D. Mich. 1977) ("The courts have long been concerned that by inquiring into the merits of the jury's deliberations would unduly harass jurors and create needless issues for post-trial litigation.")

The threat of harassment is serious enough that "local court rules frequently restrict losing litigants from gathering information concerning misconduct from jurors. Many local rules grant the trial court authority to require litigants to show 'good cause' before receiving permission to interview jurors. Other rules prohibit lawyers or parties from contacting jurors in a manner calculated to harass them or their families." Susan Crump, *Jury Misconduct, Jury Interviews, and the Federal Rules of Evidence: Is the Broad Exclusionary Principal of Rule 606(b) Justified?*, 66 N.C. L. Rev. 509, 511 (1988) (and accompanying notes, collecting examples of local rules). Indeed, Petitioner himself takes note of the fact that many local court rules as well as ethical rules limit contact between a litigant or counsel and the formers jurors in a case. Pet'r's Br. 42-43.

Petitioner contends that permitting inquiry into what a juror said in deliberations to show that she lied on voir dire would not present any danger that jurors might be harassed by disappointed parties. Indeed, Petitioner offers the surprising speculation that, given the restrictions imposed by court rules and ethical considerations, "it is unlikely that parties or their counsel would seek to contact jurors at all." *Id.* at 44. Petitioner ignores the likelihood raised by one

district court that, if this Court should hold that juror testimony would be admissible in support of a motion for new trial, such restrictions "would presumably be improper." *Shillcutt*, 602 F. Supp. at 1282. In their absence, there can be little doubt that jurors will be approached, perhaps long after the case has ended, for their version of jury room discussions.

The prospect of dealing with importuning attorneys after jury service has ended can only increase public dissatisfaction with serving on juries. In addition, the task of policing out-of-court contacts between jurors and civil litigants or criminal defendants and their lawyers is formidable. Congress has already made the decision that any potential harm to those litigants is far outweighed by the threat to the jury system arising from such contacts.

C. Rule 606(b) Protects the Finality of Jury Verdicts.

This Court pointedly expressed concern that "[a]llegations of juror misconduct, incompetency, or inattentiveness, raised for the first time days, weeks, or months after the verdict, seriously disrupt the finality of the process." *Tanner*, 483 U.S. at 120. As Judge Leaned Hand explained, it would be impractical to hold "that no verdict shall stand, unless every juror has been entirely without bias, and has based his vote only upon evidence he has heard in court." *Jorgensen*, 160 F.2d at 435. If such were the rule, he warned, federal judges "would become Penelopes, forever engaged in unravelling the webs they wove." *Id.*

Petitioner denies that permitting jurors to testify regarding the mental processes of jurors in

deliberations would not undermine the finality of the judicial process "in any meaningful sense." Pet'r's Br. 45. Oddly, Petitioner's only argument on this point is the speculation that, after receiving the juror's testimony and conducting a hearing, the court might conclude that the juror is not credible or that the movant has not met the substantive requirements for a new trial under *McDonough*. *Id.* 44-45.

The fact remains that this Court's concerns are well founded. Following every jury trial at least one civil litigant—and most criminal defendants—will have a strong incentive to move for a new trial based on what they might uncover by interviewing jurors, or at least stave off final judgment for a time. *See generally*, Annot., *Motion for New Trial as Suspension or Stay of Execution or Judgment*, 121 A.L.R. 686 (1939). Meanwhile, the district courts will be placed in the position of conducting a proceeding following nearly every jury verdict in which the jury itself may be placed on trial. The fact that the new trial motion may be denied in many cases does not cure the serious disruption of the process that this Court warned against in *Tanner*, 482 U.S. at 120-21. Such a disruption places an undue burden on the constitutional right to trial by jury.

Sadly, Americans' Seventh Amendment right to trial by jury in civil cases has suffered a "gradual process of judicial erosion." *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 339 (1979) (Rehnquist, J., dissenting). Broadening the admissibility of juror testimony regarding the subjective motives and mental processes of jurors in deliberations will contribute to that erosion.

If the Founders had desired impartiality above all else in triers of fact, they might have prescribed a class of professional jurors, trained to be wholly neutral arbitors and held to high ethical standards. In fact, our civil justice system has such a class of professional jurors in the nation's trial judges, who serve as the finders of fact in nonjury cases. Yet, the Founders insisted that this responsibility be given to ordinary citizens chosen from the community who might "reach a result that the judge either could not or would not reach." Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 Minn. L. Rev. 639, 671 (1973). To invade the confidentiality of jury deliberations in favor of a new trial inquiry on the ground that it offers "more accuracy or is fairer" would as then-Justice Rehnquist observed, "effectively permit judicial repeal of the Seventh Amendment." *Parklane Hosiery*, 439 U.S. at 346.

The fact that Petitioner advocates this unprecedented modification of the historic rule in the pursuit of greater impartiality of the jury does not change that fact. The loss is not diminished where it is well intentioned.

CONCLUSION

For the foregoing reasons, the American Association for Justice urges this Court to affirm the judgment below.

Date: August 12, 2014

Respectfully submitted,

Jeffrey R. White
Counsel of Record
CENTER FOR
CONSTITUTIONAL
LITIGATION, P.C.
777 6th Street N.W
Suite 520
Washington, DC 20001
(202) 944-2839
(202) 965-0920 (fax)
jeffrey.white@cclfirm.com

Attorney for Amicus Curiae

AMICUS CURIAE BRIEF

No. 13-517

IN THE

Supreme Court of the United States

GREGORY P. WARGER,

Petitioner,

v.

RANDY D. SHAUERS,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF LAW PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

PAUL M. SMITH
Counsel of Record
ISHAN K. BHABHA
CAROLINE M. DECELL
AMIR H. ALI
JENNER & BLOCK LLP
1099 New York Ave., NW
Washington, DC 20001
(202) 639-6000
psmith@jenner.com

Counsel for Amici Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTERESTS OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. Petitioner's Rule Would Transform Voir Dire From An Opportunity To Discover Juror Bias Into A Strategic Mechanism For Setting Up Post-Trial Motions Based On Juror Dishonesty. 4

A. Petitioner's Rule Would Incentivize Lawyers To Ask Broad Questions To Set Up Future Claims Of Juror Dishonesty, Even Though Such Questions Are The Least Effective At Uncovering Juror Bias. 5

B. Petitioner's Rule Would Make Voir Dire A More Contentious And Lengthy Process. 9

II. Petitioner's Rule Would Result In Post-Verdict Juror Dishonesty Challenges In Virtually Every Case, Leading To Interminable Inquiries Into Juror's Mental States And Disrupting The Finality Of Jury Verdicts. 11

A. Lawyers Are Under An Ethical Obligation To Represent Their Clients Vigorously And Would Thus Be Required To Pursue Juror Dishonesty Claims After Any Unfavorable Verdict. 12

B. Petitioner's Capacious Definition Of Juror Dishonesty Would Lead To Broad-Ranging Inquiries Into Jury Room Deliberations 17

C. Petitioner's Rule Would Diminish The Finality Of Jury Verdicts 23

III. Petitioner's Rule Would Impose Additional Burdens On Jurors, Further Eroding Public Participation In The Jury System While Providing Minimal Additional Assurance Of Jury Impartiality 26

A. The Burdens Of Jury Service Undermine Public Participation In The Jury System. 27

B. Petitioner's Rule Would Impose Additional Burdens On Jurors, Further Eroding Public Participation In The Jury System And Thereby Subverting Jury Impartiality 30

C. There Already Exist Adequate Disincentives And Remedies To Juror Dishonesty During Voir Dire. 33

CONCLUSION 35

TABLE OF AUTHORITIES

CASES

Brown v. United States, 411 U.S. 223 (1973) 23

Clark v. United States, 289 U.S. 1 (1933) 17, 18, 34

Commission for Lawyer Discipline v. Benson, 980 S.W.2d 425 (Tex. 1998) 16

Davis v. Brown, 23 F. App'x 504 (6th Cir. 2001) 14

Gonzales v. State, 3 S.W.3d 915 (Tex. Crim. App. 1999) 33

Ex parte Grossman, 267 U.S. 87 (1925) 34

Hard v. Burlington Northern Railroad Co., 870 F.2d 1454 (9th Cir. 1989) 23

Hazelwood School District v. United States, 433 U.S. 299 (1977) 24

J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127 (1994) 5

Kotteakos v. United States, 328 U.S. 750 (1946) 24

Kuzniak v. Taylor Supply Co., 471 F.2d 702 (6th Cir. 1972) 7

Logan v. Winstead, 23 S.W.3d 297 (Tenn. 2000) 14

Mu'Min v. Virginia, 500 U.S. 415 (1991) 5

Offutt v. United States, 348 U.S. 11 (1954) 13

Patton v. Yount, 467 U.S. 1025 (1984) 8

People v. Myers, No. 291896, 2010 WL 3063687 (Mich. Ct. App. Aug. 5, 2010) 18

Peveto v. Sears, Roebuck & Co., 807 F.2d 486 (5th Cir. 1987) 24

Polk County v. Dodson, 454 U.S. 312 (1981) 13

Polk v. State, No. M2002-02430-CCA-R3PC, 2003 WL 22243392 (Tenn. Crim. App. Sept. 30, 2003) 18

Press-Enterprise Co. v. Superior Court of California, 464 U.S. 501 (1984) 10, 11

Sanders v. Lamarque, 357 F.3d 943 (9th Cir. 2004) 23

Standard Oil Co. v. Van Etten, 107 U.S. 325 (1882) 19

Taylor v. Louisiana, 419 U.S. 522 (1975) 31

United States v. Barnett, 376 U.S. 681 (1964) 34

United States v. Benally, 546 F.3d 1230 (10th Cir. 2008) 6

United States v. Brasco, 516 F.2d 816 (2d Cir. 1975) 16

United States v. Dellinger, 472 F.2d 340 (7th Cir. 1972) 6

United States v. Holck, 398 F. Supp. 2d 338 (E.D. Pa. 2005), *aff'd sub nom. United States v. Kemp*, 500 F.3d 257 (3d Cir. 2007) 23

United States v. Lewin, 467 F.2d 1132 (7th Cir. 1972) 7

United States v. Miller, 284 F. Supp. 220 (D. Conn. 1968) 16

United States v. Stewart, 433 F.3d 273 (2d Cir. 2006) 33

United States v. Villar, 586 F.3d 76 (1st Cir. 2009) 20

Wainwright v. Witt, 469 U.S. 412 (1985) 5

Yeager v. United States, 557 U.S. 110 (2009) 23

STATUTES

28 U.S.C. § 1871(b)(1) 29

29 U.S.C. § 206(a)(1)(C) 29

Cal. Civ. Proc. Code § 215(a) 29

LEGISLATIVE MATERIALS

H.R. Rep. No. 93-1597 (1974) (Conf. Rep.) 20

Rules of Evidence: Hearings Before the S. Comm. on the Judiciary, 93d Cong. (1974) 19

S. Rep. No. 93-1277 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7051 19

OTHER AUTHORITIES

ABA Model of Rules Prof'l Conduct R 1.3 cmt. 1 12

ABA Model of Rules Prof'l Conduct R 3.5(c) 16

Albert W. Alschuler, *The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts*, 56 U. Chi. L. Rev. 153 (1989) 11

American Bar Ass'n, ". *And Justice for All": Ensuring Public Trust and Confidence in the Justice System* (2001) 26

Laura I. Appleman, *The Community Right to Counsel*, 17 Berkeley J. Crim. L. 1 (2012) 18

Barbara A. Babcock, *Voir Dire: Preserving "Its Wonderful Power"*, 27 Stan. L. Rev. 545 (1975) 8

Dale W. Broeder, *Voir Dire Examinations: An Empirical Study*, 38 S. Cal. L. Rev. 503 (1965) 8

Susan Crump, *Jury Misconduct, Jury Interviews, and the Federal Rules of Evidence: Is the Broad Exclusionary Principal of Rule 606(b) Justified?*, 66 N.C. L. Rev. 509 (1988) 15

James H. Druff, *Systemic and Individual Partiality: The Cross-Section Requirement and Jury Impartiality*, 73 Cal. L. Rev. 1555 (1988) 31-32

Fed R. Civ. P. 11(b) 13

Jayme Fraser, *Only A Third of Those Summoned for Jury Duty Show Up*, Houst. Chron., Dec. 4, 2013, http://www.houstonchronicle.com/news/politics/houston/article/Only-a-third-of-those-summoned-for-jury-duty-show-5036084.php 27

Nancy Gertner & Judith H. Mizner, *The Law of Juries* (7th ed. 2013) 9, 10, 32

Paula Hannaford-Agor, Nat'l Ctr. for State Courts, *An Overview of Contemporary Jury System Management* (May 2011), *available at* http://www.ncsc-jurystudies.org/~/media/Microsites/Files/CJS/What%20We%20Do/Contemporaryjurysystemmanagement.ashx 27, 29, 32

Paula L. Hannaford-Agor, Nat'l Ctr. for State Courts, *Increasing the Jury Pool: Impact of the Employer Tax Credit* (Aug. 2004) 31, 32

Susan E. Jones, *Judge- versus Attorney-Conducted Voir Dire*, 11 Law & Hum. Behav. 131 (1987) 9

Jury Administration, Connecticut Judicial Branch (last visited Aug. 8, 2014), *available at* http://www.jud.ct.gov/statistics/jury/Jury_13.pdf 28

Nancy J. King, *Nameless Justice: The Case for the Routine Use of Anonymous Juries in Criminal Trials*, 49 Vand. L. Rev. 123 (1996) 30

Daniel Klerman, Am. Tort Reform Ass'n, *A Look at California Juries* (Sept. 2002) 28

Stephen Knack, *Deterring Voter Registration Through Juror Selection Practices: Evidence from Survey Data*, 103 Pub. Choice 49 (2000) 27

Margaret B. Kovera, Jason J. Dickinson & Brian L. Cutler, *Voir Dire and Jury Selection, in Handbook of Psychology, Forensic Psychology* 161 (2003) 10

Gregory E. Mize, Paula Hannaford-Agor & Nicole L. Waters, Nat'l Center for St. Cts., *The State-of-the-States Survey of Jury Improvement Efforts: A Compendium Report* (Apr. 2007) 9

Pa. Prof'l Conduct R. 1.3 cmt. 1 12

In re Parker, No. 14-032-096998, Subcommittee Determination (Va. St. Bar, 3d Dist Subcomm. Mar. 27, 2014), *available at* http://www.vsb.org/docs/Parker-051614.pdf 13

Karen R. Roberts, *Voir Dire: How to Ask Questions that Matter and Get Answers that Count*, Winter 2006 ATLA-CLE 199 7

John Paul Ryan, *The American Trial Jury: Current Issues and Controversies*, 63 Soc. Educ. 458 (1999) 27

John Schwartz, *Call to Jury Duty Strikes Fear of Financial Ruin*, N.Y. Times, Sept. 1, 2009, at A1, *available at* http://www.nytimes.com/2009/09/02/us/02jury.html 29

Lior Jacob Strahilevitz, *Reputation Nation: Law in an Era of Ubiquitous Personal Information*, 102 Nw. U. L. Rev. 1667 (2008) 29-30

Tex. Disciplinary Rules Prof'l Conduct 1.01 cmt. 6 12-13

United States Courts, *Judicial Business 2013*, at Table T-1, *available at* http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2013/appendices/T01Sep13.pdf 11

Robert Walters & Mark Curriden, *A Jury of One's Peers? Investigating Underrepresentation in Jury Venires*, 43 No. 4 Judges J., Fall 2004 ..... 28, 32

Robert C. Walters et al., *Jury of Our Peers: An Unfulfilled Constitutional Promise*, 58 SMU L. Rev. 319 (2005) 28, 33

David Weinstein, *Protecting a Juror's Right To Privacy: Constitutional Constraints and Policy Options*, 70 Temple L. Rev. 1 (1997) 29

27 Charles Alan Wright & Victor James Gold, *Federal Practice and Procedure* § 6074 (2d ed. 2007) 21

In re Yunker, 25 DB Rptr. 50 (Or. Discipl. Bd. 2011), *available at* http://www.osbar.org/_docs/dbreport/dbr25.pdf 14

INTERESTS OF *AMICI CURIAE*[1]

Amici are a group of distinguished law professors who have worked on evidence and criminal law issues for many years. *Amici* were involved in the drafting process for Fed. R. Evid. 606(b) and have likewise researched and written on issues of juror bias, jury service, and voir dire. They have an academic interest in the issues presented and the correct resolution of this case.

The brief is joined by the following professors:

Susan Crump, Professor of Law, South Texas College of Law.

Bennett Gershman, Professor of Law, Pace Law School.

Victor Gold, Dean and Professor of Law, Loyola Law School, Los Angeles.

Paul Rothstein, Professor of Law, Georgetown University Law Center.

Ben Trachtenberg, Associate Professor of Law, University of Missouri School of Law.

---

[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* and their counsel made a monetary contribution to its preparation or submission. Petitioner's blanket letter of consent to the filing of amicus briefs has been filed with the Clerk's office. Respondent's consent to the filing of this brief is being filed with the Clerk's office together with the brief.

SUMMARY OF ARGUMENT

Petitioner asks this Court to interpret Fed. R. Evid. 606(b) as permitting statements made by jurors during deliberations to be admitted to support a motion for a new trial. The practical consequences of petitioner's rule would be significant and problematic, not only fundamentally altering the purpose and practice of voir dire, but also providing a new, fact-driven, basis for post-trial motions. These expanded proceedings would place substantial additional burdens of courts, lawyers and jurors alike. In light of existing mechanisms to ensure juror honesty and impartiality, petitioner's rule would disrupt a well-functioning system for little to no benefit.

1. Petitioner incorrectly argues that his rule would further the purposes of voir dire. Quite to the contrary, his rule would transform voir dire from an opportunity to discover juror bias into a strategic mechanism for setting up post-trial challenges based on juror dishonesty. Lawyers would be incentivized to ask broad and vague questions at voir dire – much like the questions at issue in this case – which maximize the likelihood that personal experiences or opinions shared during deliberations could later be characterized as inconsistent with the juror's response at voir dire. This would be the case notwithstanding that these sorts of questions are the *least* effective at uncovering juror bias. Furthermore, the possibility that voir dire questions would later form the basis for admitting statements made during deliberation would undoubtedly make voir dire a more contentious stage of the trial. This would both increase the number of

motions and appeals related to voir dire, and also make the already lengthy process of empanelling a jury even more time-consuming.

2. Petitioner's rule would also have the effect of introducing post-verdict, fact-bound allegations of juror dishonesty during voir dire into virtually every jury trial. Lawyers are under ethical obligations to diligently represent their clients, and once a jury trial has been lost, the opportunity to seek a new trial based on an allegedly dishonest statement will obligate lawyers to seek any and all information available to them about what was said during deliberations. Indeed, a failure to adequately pursue these claims could leave lawyers subject to disciplinary proceedings or charges of malpractice. Petitioner's capacious definition of "dishonesty" would only compound this problem, in that a juror's inevitable reliance on his own life experience during deliberations (which historically has been perceived as a *benefit* of the jury system) could be used as proof that the juror is irrevocably biased. Moreover, the potential for myriad interpretations (or misinterpretations) of what is said during deliberations would provide a fertile ground for new trial motions, greatly reducing the finality that a jury verdict is meant to provide.

3. Finally, Petitioner's rule would further erode public participation in the jury system while providing little additional assurance of jury impartiality. Evasion of jury service, whether through reliance on statutory excuses or failure to respond to summonses, is already a widespread problem. This problem produces sparse jury venires, thereby undermining efforts to ensure an

aspect of jury impartiality that Petitioner entirely ignores: the impartiality secured by juror selection from a broad, representative cross-section of the community. By extending jurors' involvement in a case beyond the delivery of a verdict, and by motivating attorneys to pry into jurors' personal understandings and experiences as discussed during deliberations, Petitioner's rule would enlarge existing deterrents to participation in the jury system, and for little to no benefit. Adequate deterrents and remedies to juror dishonesty during voir dire already exist, as such dishonesty may still provide grounds for a new trial (only supported by evidence not concerning deliberations), and may subject jurors to criminal sanctions. Accordingly, there is no cause for the adoption of Petitioner's burdensome rule.

ARGUMENT

I. Petitioner's Rule Would Transform Voir Dire From An Opportunity To Discover Juror Bias Into A Strategic Mechanism For Setting Up Post-Trial Motions Based On Juror Dishonesty.

Petitioner asks this Court to adopt a rule that would allow parties to pursue a post-trial motion for a new trial based on statements made during deliberations. The thrust of Petitioner's argument is that such a rule is necessary to carry out the purpose of voir dire, which "safeguards the constitutional right to trial by impartial jury." Pet'r Br. at 38. Far from being an essential component of that safeguard, however, Petitioner's rule would greatly undermine the legitimacy and the

efficacy of the voir dire process. It would also make voir dear a more contentious and laborious process.

A. Petitioner's Rule Would Incentivize Lawyers To Ask Broad Questions To Set Up Future Claims Of Juror Dishonesty, Even Though Such Questions Are The Least Effective At Uncovering Juror Bias.

This Court has consistently recognized that voir dire is intended to serve two purposes. First, it provides counsel and the court with a means of discovering actual or implied bias, such that jurors can be removed for cause. *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 143-44 (1994); *Mu'Min v. Virginia*, 500 U.S. 415, 431 (1991). A juror is biased and thus removable for cause if his "views 'would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" *Wainwright v. Witt*, 469 U.S. 412, 433 (1985)) (quoting *Adams v. Texas*, 448 U.S. 38, 45 (1980)). Second, voir dire provides counsel with the information necessary to exercise peremptory challenges. *J.E.B.*, 511 U.S. at 143; *Mu'Min*, 500 U.S. at 431. While Petitioner argues that permitting post-trial juror dishonesty claims based on statements made during deliberation would further the discovery of bias, in actual fact, it would shift the sorts of questions asked in voir dire towards those that are *least* effective in uncovering juror bias.

Under Petitioner's rule, lawyers will recognize that asking broad and vague questions at voir dire presents a significant opportunity to game the trial process. As the Tenth Circuit observed in rejecting the rule Petitioner advances, "[a] broad question during voir

dire could then justify the admission of any number of jury statements that would now be re-characterized as challenges to voir dire rather than challenges to the verdict." *United States v. Benally*, 546 F.3d 1230, 1236 (10th Cir. 2008). Lawyers would thus have the incentive to preload voir dire with broad questions, which maximize the likelihood that personal experience or opinion shared during deliberations could be characterized as inconsistent with the juror's response at voir dire. The broad questions Petitioner relies on in this case – "Is there anyone who feels they would not be a proper juror to hear this case?", "Is there any reason why you cannot remain fair and impartial?" and "Is there anyone who would not be able to render a verdict based solely on the law?" – provide excellent examples of the utility that broad questions would have. One could characterize virtually any statement of personal experience or opinion as being inconsistent with a lack of response to these questions. Any juror who, during deliberation, begins a sentence with "I knew a person who . . .", "From my personal experience . . .", or "I refuse to believe . . ." would provide fodder for a lawyer's post-trial motion that the juror misrepresented his impartiality.

Broad questions of this nature do little to further the purpose of voir dire. It is well established that such questions are the *least* effective at uncovering juror bias because they rarely elicit a meaningful response. *See United States v. Dellinger*, 472 F.2d 340, 375 (7th Cir. 1972) (holding that a "broad" and "general" voir dire question about exposure to pretrial publicity was "not adequate to bring out responses" from jurors and

"should not be relied on"); *United States v. Lewin*, 467 F.2d 1132, 1138 (7th Cir. 1972) ("[A] general question is inadequate to call to the attention of the veniremen those important matters that might lead them to recognize or to display their disqualifying attributes."); *Kuzniak v. Taylor Supply Co.*, 471 F.2d 702, 703 (6th Cir. 1972) (holding that "general questioning of the jurors as to whether they knew of any reason why they could not give the plaintiffs a fair trial" did not present sufficient opportunity for plaintiffs to uncover juror bias); *see also* Karen R. Roberts, *Voir Dire: How to Ask Questions that Matter and Get Answers that Count*, Winter 2006 ATLA-CLE-199 (suggesting that broad questions are less likely than case-specific questions to uncover juror bias). Under Petitioner's rule, however, a juror's lack of appreciation for the question at the time of voir dire actually plays into the lawyer's hands. The lawyer seeks not to elicit a meaningful response at voir dire, but to have the prospective juror provide an incomplete response, which can later be used to challenge the juror's honesty.

That lawyers will be in a position to get the better of jurors at voir dire and subsequently engineer disputes as to their honesty should go without saying. As this Court has cautioned:

> It is well to remember that the lay persons on the panel may never have been subjected to the type of leading questions and cross-examination tactics that frequently are employed, and that were evident in this case. Prospective jurors represent a cross section of the community, and their education and

> experience vary widely. Also, unlike witnesses, prospective jurors have had no briefing by lawyers prior to taking the stand. Jurors thus cannot be expected invariably to express themselves carefully or even consistently.

Patton v. Yount, 467 U.S. 1025, 1039 (1984). Furthermore, as Professor Babcock observed in her leading article on the significance of voir dire, lawyers are already well versed in taking advantage of jurors' inclinations at voir dire:

> Experienced litigators know, and empirical studies have substantiated, that it is part of the psychology of the venire for some people to decide that they want to be on the jury. To that end, such people will evade or misconstrue, unconsciously or deliberately, general voir dire questions in order to avoid answering and possibly being struck.

Barbara A. Babcock, *Voir Dire: Preserving "Its Wonderful Power"*, 27 Stan. L. Rev. 545, 547 (1975) (footnote omitted); *see also* Dale W. Broeder, *Voir Dire Examinations: An Empirical Study*, 38 S. C. L. R. 503, 510-11 (1965) (describing several examples in which jurors do not respond to voir dire questions because, for instance, they are "too nervous"). Lawyers will no doubt be able to shape broad questions that elicit an incomplete response at voir dire, but lay the groundwork for a post-trial challenge based on dishonesty.

This risk is particularly acute in federal courts, where parties submit voir dire questions to a judge, who then conducts most of the inquiry. *See* Nancy Gertner & Judith H. Mizner, *The Law of Juries* § 3:21, at 101 (7th ed. 2013); Gregory E. Mize, Paula Hannaford-Agor & Nicole L. Waters, Nat'l Center for St. Cts., *The State-of-the-States Survey of Jury Improvement Efforts: A Compendium Report*, 27-28 (Apr. 2007). Empirical research demonstrates that jurors are even more likely to give incomplete answers when questioned by a judge than by a lawyer, due, at least in part, to intimidation as a result of the judge's position as an authority figure. *See* Susan E. Jones, *Judge- Versus Attorney-Conducted Voir Dire*, 11 Law & Hum. Behav. 131 (1987); Gertner & Mizner, *supra*, at 102 ("[L]awyer voir dire promotes more candid exchanges than does judge voir dire."). Judges themselves are in a poor position to distinguish between those questions that are a legitimate attempt to uncover bias and those that a lawyer has designed to set up a post-trial challenge both because judges typically "know little about a case" at the time of voir dire and because judges, as a general matter, are not experts in distinguishing between questions that will lead to "distorted" answers and those that will not. Gertner & Mizner, *supra*, §§ 3:19, 3:21, at 97, 102.

B. Petitioner's Rule Would Make Voir Dire A More Contentious And Lengthy Process.

Because lawyers for both parties will recognize the opportunity to set up post-trial challenges, Petitioner's rule would also make voir dire itself a more contentious exercise. Faced with the risk of having responses at

voir dire used as the premise for undoing an entire trial, parties will no doubt strenuously contest the questions advanced by their opponents. Again, trial judges will generally be ill-equipped to resolve such disputes given the "limited information" that they have at the time of voir dire. Gertner & Mizner, *supra*, § 3:21, at 102. The trial judge's decision to reject certain questions, however, will no doubt become the subject of post-trial motions and appeals, on the basis that the rejected question would have provided a basis for challenging the juror for dishonesty given statements made during deliberation. None of these disputes, of course, would have anything to do with actually uncovering juror bias. Indeed, they would only distract from that pursuit.

And that distraction would come with a cost. The efforts of lawyers to elicit as many responses (or nonresponses) as possible that could later be used to challenge a juror's honesty, combined with the disputes that arise therefrom, would lengthen a voir dire process that, in most courts, is already long enough. This Court has previously recognized the importance of limiting voir dire to a reasonable length of time, cautioning that an excessively long voir dire "in and of itself undermines public confidence in the courts and the legal profession." *Press-Enter. Co. v. Super Ct. of Cal.*, 464 U.S. 501, 510 n.9 (1984). Even without the added disturbance that would follow from Petitioner's rule, voir dire in both civil and criminal cases can last weeks or months. *See* Margaret B. Kovera, Jason J. Dickinson & Brian L. Cutler, *Voir Dire and Jury Selection, in Handbook of Psychology*, Forensic Psychology 161

(2003); *see also* Albert W. Alschuler, *The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts*, 56 U. Chi. L. Rev. 153, 157 n.13 (1989) (referring to a study finding that in twenty percent of New York cases, voir dire took longer than the trial itself); *Press-Enterprise*, 464 U.S. at 510 n.9 (acknowledging counsel's statement that "it is not unknown in California courts for jury selection to extend six months"). The Court should not accept Petitioner's rule, which, in addition to being counterproductive to the goals of voir dire, would make the lengthy process of empanelling a jury even longer.

II. Petitioner's Rule Would Result In Post-Verdict Juror Dishonesty Challenges In Virtually Every Case, Leading To Interminable Inquiries Into Juror's Mental States And Disrupting The Finality Of Jury Verdicts.

Petitioner, evidently aware of the dramatic consequences that his rule could have on the thousands of jury trials that take place each year in federal courts,[2] claims his rule would neither lead to jurors being "harassed and beset by the defeated party" post trial, Pet'r Br. 42 (quoting *McDonald v. Pless*, 238 U.S. 264, 267 (1915)), nor detract from the finality of jury

---

[2] During the year ending on September 30, 2013, there were 4,517 jury trials in the United States District Courts. United States Courts, *Judicial Business 2013*, at Table T-1, *available at* http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2013/appendices/T01Sep13.pdf.

verdicts, *see* Pet'r Br. 44. Despite Petitioner's claims to the contrary, the two practical problems he highlights are necessary consequences of the rule he propounds. Lawyers' duties to their clients would require that they vigorously pursue the possibility of post-trial juror dishonesty claims in every case, and in so doing lawyers would engage in the wide-ranging investigation into jury room proceedings that Rule 606(b) is designed to prevent. Moreover, the availability of this new, fact-driven, attack on a verdict would open up an entirely new avenue for post-trial proceedings, diluting the finality that jury verdicts are intended to provide.

A. Lawyers Are Under An Ethical Obligation To Represent Their Clients Vigorously And Would Thus Be Required To Pursue Juror Dishonesty Claims After Any Unfavorable Verdict.

Under ABA Model Rules of Prof'l Conduct R 1.3, a lawyer is required to act with "reasonable diligence and promptness in representing a client." As explained in greater detail in the comments to the model rule, reasonable diligence requires a lawyer to "take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf." ABA Model Rules of Prof'l Conduct R. 1.3 cmt. 1; *see also* Pa. Prof'l Conduct R. 1.3 cmt. 1 ("A lawyer should . take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor."); Tex. Disciplinary Rules Prof'l

Conduct R. 1.01 cmt. 6 ("[A] lawyer should act . . . with zeal in advocacy on the client's behalf.").

This Court has likewise long recognized that fundamental to the role of an attorney is "'fearless, vigorous and effective' advocacy, no matter how unpopular the cause in which it is employed." *Offutt v. United States*, 348 U.S. 11, 13 (1954) (quoting *Sacher v. United States*, 343 U.S. 1, 13-14 (1952)).

Naturally, the vigorous representation of a client has its limits, and lawyers are not permitted to pursue knowingly frivolous or vexatious motions or appeals. *See, e.g.*, Fed R. Civ. P. 11(b); *Polk Cnty v. Dodson*, 454 U.S. 312, 323 (1981) ("[T]he canons of professional ethics impose limits on permissible advocacy. It is the obligation of any lawyer – whether privately retained or publicly appointed – not to clog the courts with frivolous motions or appeals."). Nevertheless, so long as a viable avenue for overturning an unfavorable verdict exists, lawyers are bound to vigorously pursue that avenue to the best of their abilities.

Indeed, a failure to vigorously advocate on the part of a client does not merely violate a lawyer's ethical obligations, but leaves him open to a variety of adverse consequences as well. For example, a failure to raise potentially viable post-trial motions can result in an adverse proceedings before bar disciplinary committees and sanctions ranging from censure to disbarment. *See In re Parker*, No. 14-032-096998, Subcommittee Determination (Va. St. Bar 3d Dist. Subcomm. Mar. 27, 2014), *available at* http://www.vsb.org/docs/Parker-051614.pdf (publicly admonishing attorney for, inter alia, failing to file post-trial motion to modify client's

sentence, which he had been retained to author and submit); *In re Yunker*, 25 DB Rptr. 50, 52 (Or. Discipl. Bd. 2011), *available at* http://www.osbar.org/_docs/dbreport/dbr25.pdf (publicly reprimanding an attorney for, inter alia, failing to file a motion to set aside the administrative dismissal of a case in which he was attempting to collect an arbitration award). Likewise, the failure to raise a meritorious post-trial motion has been deemed to be professional malpractice in some instances, leaving a lawyer open not only to the opprobrium of a malpractice finding, but also to the financial consequences of a damages judgment. *See Davis v. Brown*, 23 F. App'x 504, 506 (6th Cir. 2001) (upholding $10,000 punitive damages award against attorney who committed legal malpractice by failing to file a motion requested by his client); *see also Logan v. Winstead*, 23 S.W.3d 297, 299 n.4 (Tenn. 2000) (noting that failure to file proper motions, such as a motion to suppress evidence or a motion to confront a confidential informant, constitutes legal malpractice).

In light of these requirements of diligent advocacy, were FRE 606(b) read to allow the use of statements made in the jury room as the basis for a new trial motion, every time a lawyer lost a jury trial he would be required to go to any permissible lengths to discover what was said by jurors during deliberations. Petitioner argues that "mere admission of evidence that tends to show juror dishonesty during voir dire would not automatically entitle a party to a new trial under *McDonough*." Pet'r Br. 44. But whether or not Petitioner's rule would actually undermine numerous jury verdicts – and in light of his capacious definition of

"dishonesty" there is reason to believe it would, *see infra* 17-22 – Petitioner's argument is a tacit acknowledgement that the consequences of a ruling in his favor would be to make a post-trial inquiry into juror dishonesty, and likely an ensuing motion, a feature of *every* jury trial. The consequences of this new raft of motions for the conservation of scarce judicial resources would necessarily be severe. *See* Susan Crump, *Jury Misconduct, Jury Interviews, and the Federal Rules of Evidence: Is the Broad Exclusionary Principal of Rule 606(b) Justified?*, 66 N.C. L. Rev. 509, 533 (1988) ("An adverse jury verdict is a painful event, combining personal rejection and professional failure with injury to the client who relied on the lawyer. The losing trial lawyer, therefore, may have an unusually strong inclination to search vigorously for misconduct, attribute the loss to it, and construct arguments maximizing the effect of marginal violations, even as she searches her own mind for the cause of the verdict. For these reasons, open reception of evidence of jury misconduct would consume judicial resources inefficiently.").

Moreover, it is a red herring for Petitioner to point to the well-established ethical rules that "generally prohibit counsel from engaging in any form of juror harassment." Pet'r Br. 43 (citing, *e.g.*, Model Rules of Prof'l Conduct R. 3.5(c)). For one, the definition of what constitutes juror "harassment" is hardly uniform, and especially if lawyers become ethically bound to pursue potential juror dishonesty post-trial motions, what once might have been considered harassing could be deemed within the bounds of diligent

representation. *See, e.g., Comm'n for Lawyer Discipline v. Benson*, 980 S.W.2d 425, 439 (Tex. 1998) (noting that courts have disagreed on "whether the term 'harass' standing alone is clear enough to survive a vagueness review," and citing cases). Moreover, while it is true that lawyers are generally prohibited from contacting jurors who have made known a desire not to be contacted, *see* ABA Model Rules Prof'l Conduct R. 3.5(c), Petitioner entirely ignores the fact that a juror accused of dishonesty by a fellow juror – analogous to what happened in this very case – could nevertheless be forced into post-trial proceedings and potentially required to testify in court about statements she made during deliberations. So long as a single member of the jury has doubts about something that was said and reaches out to the losing counsel, the carefully calibrated rules that ensure jurors' involvement with a case ends once the verdict is read could be rendered largely meaningless. Finally, the mere presence of a rule prohibiting lawyers from harassing jurors of course does not prevent such harassment from already occurring, even without the added incentive of the potential reversal of an adverse verdict. *See, e.g., United States v. Brasco*, 516 F.2d 816, 819 n.4 (2d Cir. 1975) (describing as "reprehensible" the "complicity by counsel in a planned, systematic, broad-scale post-trial inquisition of the jurors by a private investigator"); *United States v. Miller*, 284 F. Supp. 220, 228 (D. Conn. 1968) (issuing an injunction preventing defense counsel from having further contact with jurors post-trial and noting that "[l]eaving jurors at the mercy of investigators for both sides to probe into their conduct would make the already difficult task

of obtaining competent citizens willing to serve as jurors well nigh impossible").

B. Petitioner's Capacious Definition Of Juror Dishonesty Would Lead To Broad-Ranging Inquiries Into Jury Room Deliberations.

The potential adverse consequences of Petitioner's rule are only heightened in light of the capacious definition of juror "dishonesty" he advocates for in this case. Pinpointing the actual "dishonest" statement alleged in Petitioner's brief is something of a challenge. It appears, however, that Petitioner is relying on the foreperson's silence in response to the judge's questions about whether any prospective juror "would not be a proper juror to sit in a case of this kind," and would not be "able to render a verdict based solely and only on the law." Pet'r Br. 6 (quotation marks omitted). The argument appears to be that this was dishonest because the foreperson was strongly influenced by prior experiences of her daughter. *Id.* Although the question presented in this case assumes the foreperson's silence was dishonest, it is hardly clear that she was irrevocably conflicted and misrepresented that fact during voir dire.

In this respect, *Clark v. United States*, 289 U.S. 1 (1933), is instructive. In *Clark*, this Court upheld a finding of criminal contempt upon finding that a juror had failed to disclose that she had worked for a company owned by the defendant and that even after her employment had concluded her husband maintained close relations with the defendant. *Id.* at 7. Those personal contacts led the juror to "place[] her hands over her ears when other jurors tried to reason with

her," and she discussed extraneous evidence with the jury in an attempt to discredit the government and create sympathy for the defendant. *Id.* at 8-9. *Clark* is worlds apart from the conduct at issue in this case, and courts have found no prejudice to a party even when a juror has connections more significant than anything even alleged against the foreperson here. *See, e.g.*, *People v. Myers*, No. 291896, 2010 WL 3063687, at *4-5 (Mich. Ct. App. Aug. 5, 2010) (offender not prejudiced by having juror who recognized during trial that the complaining witness was the vice-president of the union to which the juror belonged); *Polk v. State*, No. M2002-02430-CCA-R3PC, 2003 WL 22243392, at *5 (Tenn. Crim. App. Sept. 30, 2003) (holding, on post-conviction review, that no evidence existed to show that offender was prejudiced by having juror who worked with the prosecutor's wife).

Indeed, Petitioner's rule could be particularly pernicious because it transforms a juror's life experiences and understanding of the community – long understood to be the benefit of adjudication by a jury of the parties' peers – into a unrebuttable presumption of bias and prejudice in favor of one side. *See* Laura I. Appleman, *The Community Right to Counsel*, 17 Berkeley J. Crim. L. 1, 34 (2012) ("Both in England and in the colonies, the community was represented by the jury, that bulwark of societal conscience, perfectly suited, in Hale's opinion, 'for the preservation of liberty, life, and property.'" (quoting Matthew Hale, *The History of the Common Law of England, and an Analysis of the Civil Part of the Law* 346 (6th ed., 1820)). Ridding a juror of her prior experiences is as

impossible as it is undesirable. *See Standard Oil Co. v. Van Etten*, 107 U.S. 325, 334 (1882) ("The very spirit of trial by jury is that the experience, practical knowledge of affairs, and common sense of jurors, may be appealed to, to mediate the inconsistencies of the evidence, and reconcile the extravagances of opposing theories of the parties.").

Rule 606(b) was designed to prevent precisely this type of post-hoc dissection of juror motivations and internal mental processes. Not only does the text of the rule prevent any post-trial testimony (for the purposes of attacking a verdict) on "any juror's mental processes concerning the verdict," but the legislative history recognizes that a rule to the contrary would leave jurors' motivations constantly subject to question in an attempt to undermine validly-reached verdicts. *See, e.g., Rules of Evidence: Hearings Before the S. Comm. on the Judiciary*, 93d Cong. 225 (1974) (statement of Paul F. Rothstein, Professor of Law, Georgetown Univ. Law Ctr.) (noting that House version of FRE 606(b), which would have permitted testimony concerning jury deliberations "is antithetical to the smooth functioning of the jury system and conflicts with the traditional policy justifications for juror incompetency – the encouragement of full and frank jury deliberations and the avoidance of juror harassment, annoyance, and reprisals"); S. Rep. No. 93-1277, at 14 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7051, 7061 ("Public policy requires a finality to litigation. And common fairness requires that absolute privacy be preserved for jurors to engage in the full and free debate necessary to the attainment of just

verdicts. Jurors will not be able to function effectively if their deliberations are to be scrutinized in post-trial litigation. In the interest of protecting the jury system and the citizens who make it work, rule 606 should not permit any inquiry into the internal deliberations of the jurors."); H.R. Rep. No. 93-1597, at 8 (1974) (Conf. Rep.) (adopting Senate amendments and rejecting the House version of the FRE, which would have allowed "a juror to testify about objective matters occurring during the jury's deliberation").

Even laying aside the theoretical problems with Petitioner's rule, his wide-ranging conception of what constitutes juror dishonesty would also lead to intractable administrative problems. To be clear, and contrary to virtually the entirety of the brief filed by amicus curiae National Association of Criminal Defense Lawyers, this case does not concern juror biases related to characteristics such as race, gender, or religion. While it may well be appropriate for this Court to recognize, in a different case, that the presence of such biases violates a party's constitutional rights, this case involves the entirely distinct question whether a prior life experience such as a family member's involvement with a car accident renders a juror unfit to serve.[3] If the foreperson's prior

---

[3] The First Circuit has recognized that FRE 606(b) cannot be constitutionally applied when issues of racial or ethnic bias cast into doubt the impartiality of a jury. *See United States v. Villar*, 586 F.3d 76, 87 (1st Cir. 2009) ("While the issue is difficult and close, we believe that the rule against juror impeachment cannot be applied so inflexibly as to bar juror testimony in those rare and

experiences rendered her silence during voir dire dishonest, it is hard to see what types of experiences would *not* necessitate disqualification. For example, would a juror in a contract case be lying if he claimed impartiality during voir dire yet at some point in the past had been accused by a business partner of breach of contract? Or, does a previous negative experience with a police officer render a juror permanently unfit to serve on a jury in a criminal trial? Indeed, even juror forgetfulness could lead to a juror honesty challenge. For example, what if a juror forgot about a bad experience with a car dealership during voir dire, but later recalled such an experience and recounted it during deliberations? Or, what if a juror stated that she has never lived in a "gang neighborhood" during voir dire, yet later makes a statement during deliberations that other jurors interpret as evidence that the juror had in fact lived in such a neighborhood? The possible bases for juror dishonesty challenges are endless.

Given that every adult has already amassed a wealth of life experiences both positive and negative,

---

grave cases where claims of racial or ethnic bias during jury deliberations implicate a defendant's right to due process and an impartial jury."); *see also* 27 Charles Alan Wright & Victor James Gold, Federal *Practice and Procedure* § 6074, at 513 (2d ed. 2007) ("[A]mong the most serious cases of jury bias are those involving racial prejudice... This suggests that the constitutional interests of the affected party are at their strongest when a jury employs racial bias in reaching its verdict.... This also suggests that the policy interests behind the enforcement of Rule 606(b) are at their weakest in such a case.").

Petitioner's rule not only would vastly expand the scope of voir dire questioning, *see supra* 4-11, but also would encourage losing counsel to develop creative theories impugning the neutrality of jurors. At that point, jurors already discharged from service might well be required to return to court and testify as to their motivations and reasons for rendering the verdict they did. Judges, in turn, would be faced with the nearly impossible task of reviewing a juror's life history and justifications for the verdict to determine whether the juror was actually dishonest during voir dire. This would in effect require a post-verdict mini-trial, requiring adjudication of all the attendant questions of admissibility and burden of proof.

These concerns are not merely theoretical. Indeed, a survey of juror dishonesty claims brought in courts in the Ninth Circuit – which has adopted the rule Petitioner proposes – demonstrates the extent to which the alleged bases for dishonesty stray far afield from traditional notions of failing to disclose conflicts of interest.[4] Emboldened by the Ninth Circuit's standard,

---

[4] When given a sign that a court is receptive to juror-dishonesty claims, defense attorneys have made some truly frivolous arguments. In one recent Pennsylvania case, a juror who worked 37.5 hours a week at an accounting firm stated that her "usual" job was as an accountant. The defendant later claimed that this answer had been dishonest in light of the fact that the same juror had a second, part-time job as a realtor, where she assisted in a home sale once every few months. The judge rejected this argument, concluding that the juror's self-identification as an accountant "simply cannot be considered a dishonest answer."

many defendants have argued that jurors acted "dishonestly" merely by failing to affirmatively volunteer probative information to defense counsel. *See, e.g., Sanders v. Lamarque*, 357 F.3d 943, 949 (9th Cir. 2004) (no juror dishonesty when juror failed to disclose that she had lived in a gang neighborhood 25 years ago when asked whether she *currently* lived in a gang neighborhood); *Hard v. Burlington N. R.R. Co.*, 870 F.2d 1454, 1460 (9th Cir. 1989) (no jury dishonesty when juror failed to disclose past employment when asked about *current* employment).

C. Petitioner's Rule Would Diminish The Finality Of Jury Verdicts.

A jury's verdict, this Court has observed "represents the community's collective judgment regarding all the evidence and arguments presented to it." *Yeager v. United States*, 557 U.S. 110, 122 (2009). The finality of verdicts is so central to the judicial process that this Court has noted "[e]ven if the verdict is 'based upon an egregiously erroneous foundation,' its finality is unassailable." *Id.* at 122-23 (quoting *Fong Foo v. United States*, 369 U.S. 141, 143 (1962) (per curiam)). This is not to say of course that meritorious post-trial motions and appeals should not be pursued. But in recognition of the reality that litigants are entitled "to a fair trial but not a perfect one, for there are no perfect trials," *Brown v. United States*, 411 U.S. 223, 231-32 (1973) (internal quotation marks omitted),

---

United States v. Holck, 398 F. Supp. 2d 338, 361 (E.D. Pa. 2005), *aff'd sub nom. United States v. Kemp*, 500 F.3d 257 (3d Cir. 2007).

courts entertaining post-trial motions do not sit as "citadels of technicality" rooting out any possible error, regardless of how minor, as a basis upon which to reverse a jury verdict, *Kotteakos v. United States*, 328 U.S. 750, 759 (1946) (quotation marks omitted). *See Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 319 (1977) (Stevens, J., dissenting) (noting that while it is "always possible to imagine more evidence which could have been offered .. at some point litigation must come to an end."). Respect for the finality of jury verdicts not only is a question of judicial principles, but also reflects a recognition of the cost – both financial and emotional – to parties when proceedings run on *ad infinitum*. *See Peveto v. Sears, Roebuck & Co.*, 807 F.2d 486, 489 (5th Cir. 1987) ("Of course, in the jury trial process there is always some danger that jurors will misunderstand the law or consider improper factors in reaching their verdict, but, by implementing Rule 606(b), Congress has made the policy decision that the social costs of such error are outweighed by the need for finality to litigation, to protect jurors from harassment after a verdict is rendered, and to prevent the possible exploitation of disgruntled ex-jurors.").

Permitting post-trial investigation of juror's mental processes to form the basis for a new trial motion would open up an entirely new factual avenue for lawyers to pursue, and would necessitate substantial investigation, discovery, and potentially even in-court testimony. In this respect, a juror dishonesty post-trial challenge is different in kind from the majority of post-trial motions and appeals, which are limited to the record created at trial and focus on events that were raised and litigated

during trial. By definition, a juror dishonesty challenge requires the discovery and introduction of new evidence – the juror's statements and motivations during deliberation – which will lead to costly investigations and repeated attempts to seek new information from both the challenged juror and other members of the jury. This process will be time-consuming and expensive and, given Petitioner's capacious definition of dishonesty, all of these efforts would be expended merely to reveal that a juror was informed by her prior life experiences in rendering a verdict, something that should be encouraged not prohibited.

Petitioner claims there is no cause for concern as regards the finality of the judicial process because "a *McDonough* motion would still be denied if a court determines that the juror's response to a voir dire question was not dishonest at the time it was made," or "that an honest answer to a material question would not have provided a valid basis for a challenge for cause." Pet'r Br. 45. In light of these substantive hurdles, Petitioner assures this Court that "*McDonough's* requirements have proven to be stringent in application." *Id.*

Petitioner's assurances are unavailing. If in practice *McDonough* challenges will frequently if not always be rejected in light of the tough substantive standards Petitioner allegedly proposes, then it is even more dubious that a costly and extensive new post-trial process is necessary or appropriate. While of course verdicts should not be rendered by jurors who should have been removed with valid strikes for cause, if

Petitioner is correct and these challenges are rarely successful, it suggests that the problem Petitioner claims is illusory or at least far less pervasive than he suggests. If this Court were to accept Petitioner's definition of juror dishonesty it is possible that claims of dishonesty would fare better going forward than they have to date. But, as suggested above, this would not be because more unfit jurors were properly being removed from panels, but rather because perfectly valid jurors whose verdicts were informed by their life experiences were improperly being denied an opportunity to serve.

III. Petitioner's Rule Would Impose Additional Burdens On Jurors, Further Eroding Public Participation In The Jury System While Providing Minimal Additional Assurance Of Jury Impartiality.

A wide majority of Americans consider the right of trial by jury integral to the legitimacy of the U.S. judicial system. *See* Am. Bar Ass'n, ". *And Justice for All": Ensuring Public Trust and Confidence in the Justice System* 6 (2001). Yet the burdens of jury service – from the commitment of time and often attendant loss of wages to the privacy intrusions incident to the selection process – frequently prove more than citizens are willing to bear when summoned. Consequently, whether relying on statutory excuses or simply failing to respond to summonses, citizens evade jury service at considerable rates. By imposing additional burdens on jurors, Petitioner's rule would only exacerbate the widespread problem of jury evasion, to the detriment of courts and litigants alike.

A. The Burdens Of Jury Service Undermine Public Participation In The Jury System.

Evasion of jury service has long plagued the administration of justice in the United States. Citizens' failure to respond to summons and failure to appear at court "are a chronic problem in jury operations," occurring at an average national rate of eight percent. Paula Hannaford-Agor, Nat'l Ctr. for State Courts, *An Overview of Contemporary Jury System Management* 7 (May 2011), *available at* http://www.ncsc-jurystudies.org/~/media/Microsites/Files/CJS/What%20We%20Do/Contemporaryjurysystemmanagement.ashx. An equally high percentage of those who do respond to jury summons then request to be excused on grounds of medical or financial hardship or extreme inconvenience. *Id.*[5]

These problems are even more pronounced in particular jurisdictions. Recent statistics from San Antonio, Texas reveal that over 35 percent of those summoned for jury duty ignore their summons altogether. *See* Jayme Fraser, *Only A Third of Those Summoned for Jury Duty Show Up*, Hous. Chron., Dec. 4, 2013, http://www.houstonchronicle.com/news/politics/houston/article/Only-a-third-of-those-

---

[5] Still others go to even greater lengths to avoid jury service. For example, some citizens do not register to vote in an effort to avoid placement on jury lists. *See* Stephen Knack, *Deterring Voter Registration Through Juror Selection Practices: Evidence from Survey Data*, 103 Pub. Choice 49, 59 (2000); John Paul Ryan, *The American Trial Jury: Current Issues and Controversies*, 63 Soc. Educ. 458 (1999).

summoned-for-jury-duty-show-5036084.php. In Dallas County and Harris County, Texas, "less than one-fifth of the people summoned to jury service ever make it to the courthouse." Robert C. Walters et al., *Jury of Our Peers: An Unfulfilled Constitutional Promise*, 58 SMU L. Rev. 319, 319 (2005). Only about 15 percent of Connecticut citizens who received a jury summons in 2013 actually served on a jury. *See* Jury Administration, Conn. Judicial Branch (last visited Aug. 8, 2014), *available at* http://www.jud.ct.gov/statistics/jury/Jury_13.pdf. And in California, where Petitioner's rule prevails, "[b]arely a quarter of those summoned actually complete their service." Daniel Klerman, Am. Tort Reform Ass'n, *A Look at California Juries* 2 (Sept. 2002) (explaining study findings that nearly a third of those summoned sought excusal for hardship or failed to appear); *see also* Walters et al., *supra* at 328 ("[M]ost states wrestle with equally high no-show rates." (quoting Tom Munsterman, Director of Jury Studies at the National Center for State Courts); Robert Walters & Mark Curriden, *A Jury of One's Peers? Investigating Underrepresentation in Jury Venires*, 43 Judges J. Fall 2004 at 17 (reporting that other jurisdictions, such as Washington, D.C., have even lower participation rates).

The reasons for such low rates of jury participation are readily apparent. Jury service imposes considerable burdens on citizens. Foremost among these burdens is the commitment of time associated with jury service and, in many cases, the attendant loss of income. Many employers do not pay employees for work missed due to jury service, and juror

compensation is meager. Federal courts – which are among the most generous – pay jurors only $40 per day of service, *see* 28 U.S.C. § 1871(b)(1); *cf.* Cal. Civ. Proc. Code § 215(a) (providing juror compensation of $15 per day after the first day), whereas an eight-hour workday at the federal minimum wage amounts to $58, *see* 29 U.S.C. § 206(a)(1)(C) (stating current federal minimum wage of $7.25 per hour). Thus, "financial hardship and extreme inconvenience are often as much the result of the burden imposed on prospective jurors from jury service as the prevailing socioeconomic conditions in the community." Hannaford-Agor, *Overview of Contemporary Jury System Management*, *supra*, at 7; *see also* John Schwartz, *Call to Jury Duty Strikes Fear of Financial Ruin*, N.Y. Times, Sept. 1, 2009, at A1, *available at* http://www.nytimes.com/2009/09/02/us/02jury.html (reporting on increasing number of citizens seeking excuse from jury service during economic recession).

Beyond financial hardship, citizens fear the invasion of privacy that often accompanies their appearance for jury service. For many jurors, "the price of such service may include intrusive questioning, disclosure of their answers to the news media, background investigations by counsel, release of their name and address to the defendant and the public, and repeated attempts by the press to obtain post-trial interviews." David Weinstein, *Protecting a Juror's Right To Privacy: Constitutional Constraints and Policy Options*, 70 Temple L. Rev. 1, 2-3 (1997). The threat of such loss of privacy acts as a powerful disincentive to appear for jury service in the first place. *See* Lior

Jacob Strahilevitz, *Reputation Nation: Law in an Era of Ubiquitous Personal Information*, 102 Nw. U. L. Rev. 1667, 1694 (2008) ("Jury duty is already viewed as an unappetizing prospect for many Americans, and the loss of privacy associated with comprehensive government background checks [in the voir dire context] could prompt stiff resistance and exacerbate juror absenteeism."); Nancy J. King, *Nameless Justice: The Case for the Routine Use of Anonymous Juries in Criminal Trials*, 49 Vand. L. Rev. 123, 126 (1996) (discussing reports "that many people are reluctant to serve as jurors even in misdemeanor cases and . fear being approached at home after their assigned case has ended").

B. Petitioner's Rule Would Impose Additional Burdens On Jurors, Further Eroding Public Participation In The Jury System And Thereby Subverting Jury Impartiality.

Petitioner's rule would add significantly to the burdens described above. By allowing the introduction of testimony concerning juror deliberations to show juror dishonesty during voir dire, Petitioner's rule would incorporate a post-trial inquiry into juror dishonesty, and likely an ensuing motion, into nearly every jury trial. *See supra* 14-15. Such post-trial inquiries and motions would necessarily extend the jurors' involvement with a case, thereby increasing the time commitment and financial hardships associated with jury service in general. Moreover, these inquiries would threaten an even deeper invasion of privacy than that occasioned by the typical trial: Attorneys would have an incentive, and likely even a duty, to mine jury

deliberations for any indications of a juror's life experiences or personal understandings that might conflict with his statements or omissions during voir dire. As a result, Petitioner's rule would augment two of the greatest disincentives to citizens' participation in the jury system, leading only to increased rates of jury evasion.

Perhaps Petitioner would justify the additional costs of judicial administration resulting from increased rates of jury evasion[6] as necessary to secure the worthy promise of jury impartiality. But while Petitioner and his supporting amici insist that "interpreting Rule 606(b) to preclude juror testimony regarding dishonesty during voir dire would conflict with the fundamental constitutional right to an impartial jury," Professors Br. in Supp. of Pet. 29; *see* Pet'r Br. 18, 38; NACDL Br. 6, they ignore entirely a competing aspect of impartiality embedded in the same constitutional right: the "diffused impartiality" of the jury achieved through selection from a venire that is "broadly representative of the community." *Taylor v. Louisiana*, 419 U.S. 522, 530-31 (1975) (quoting *Thiel v. S. Pacific Co.*, 328 U.S. 217, 227 (1946) (Frankfurter, J., dissenting)); *see* James H. Druff, *Systemic and*

---

[6] These costs may be considerable. *See* Paula L. Hannaford-Agor, Nat'l Ctr. for State Courts, *Increasing the Jury Pool: Impact of the Employer Tax Credit* 1 n.5 (Aug. 2004) (explaining that "[t]he greater the number of prospective jurors who are excused for financial hardship," or who simply fail to appear, "the greater the administrative cost of the jury system on a per juror basis" (citation omitted)).

Individual Partiality: The Cross-Section Requirement and Jury Impartiality, 73 Cal. L. Rev. 1555, 1558 (1988) ("The concept of impartiality .. has come to designate both the detachment of the selection process and the detachment of the individual jurors.").

Jury evasion undermines the efforts of courts to assemble a broad, representative cross-section of the community from which to empanel a jury.[7] *See* Walters & Curriden, *supra*, at 18 ("If a representative cross-section means anything, we must have significant public participation." (quoting Professor Thomas Baker)); Paula L. Hannaford-Agor, Nat'l Ctr. for State Courts, *Increasing the Jury Pool: Impact of the Employer Tax Credit* 1 (Aug. 2004) (explaining that absence due to financial hardship "tends to skew the resulting composition of the jury pool to the more affluent segments of society, potentially violating fair cross section requirements"). And there is evidence suggesting that higher rates of jury evasion result in disproportionately low representation of certain demographic groups, including minorities and low-

---

[7] Juror absenteeism and recourse to hardship excuses may not support a fair cross-section challenge. *See* Gertner & Mizner, *supra*, § 2:1, at 28 (explaining that the Sixth Amendment "creates a negative right, *i.e.*, freedom from systematic exclusion"); *cf.* Hannaford-Agor, *An Overview of Contemporary Jury System Management*, *supra*, at 13 ("Nevertheless, the question of whether the impact of socioeconomic factors on the demographic composition of the jury pool could support a fair cross section claim is still unsettled."). Regardless, the Court should be hesitant to adopt a rule that would subvert in practice the principle it purportedly vindicates.

income workers, on jury venires. *See* Walters et al., *supra*, at 330-31 (suggesting that widespread jury evasion results in disproportionately low representation of Hispanics, young adults, and low-income workers on jury venires). Thus, by augmenting existing disincentives to participation in the jury system, Petitioner's rule would subvert a competing yet equally important component of the impartiality it purportedly vindicates.

C. There Already Exist Adequate Disincentives And Remedies To Juror Dishonesty During Voir Dire.

In any event, Petitioner's rule is not necessary to ensure the impartiality of the individual jurors ultimately selected to a panel. Misrepresentations by jurors during voir dire may still provide grounds for a new trial if substantiated by admissible evidence. Rule 606(b) cordons off only a small subset of the evidence an attorney could present in support of a *McDonough* challenge. *See United States v. Stewart*, 433 F.3d 273, 306 (2d Cir. 2006) (cautioning "district courts that, if any significant doubt as to a juror's impartiality remains in the wake of objective evidence of false *voir dire* responses, an evidentiary hearing generally should be held").[8] And the threat of prosecution and possible

---

[8] Statutory disqualifications that surface after jury selection can form the basis for a motion for a new trial in other jurisdictions as well. *See, e.g.*, *Gonzales v. State*, 3 S.W.3d 915, 916 (Tex. Crim. App. 1999) (explaining that, "with respect to oral questions asked during voir dire, ... error occurs where a prejudiced or biased juror is selected without fault or lack of diligence on the part of

imprisonment under *Clark*, where the Court held that "that "[c]oncealment or misstatement by a juror upon a voir dire examination is punishable as a contempt if its tendency and design are to obstruct the processes of justice," 289 U.S. at 10, is a direct, powerful, and therefore adequate deterrent to juror dishonesty during voir dire. *See United States v. Barnett*, 376 U.S. 681, 756 (1964) ("The sanction imposed for criminal contempt has always been designed to deter future defiances of the court's authority and to vindicate its dignity"); *Ex parte Grossman*, 267 U.S. 87, 111 (1925) (noting that punishment for criminal contempt is intended, inter alia, to "deter other like derelictions").

Given these tested means of ensuring juror impartiality, Petitioner's rule would be of little additional service to that end. Meanwhile, the additional burdens it would impose on jurors would further erode broad public participation in the jury system and thereby subvert the "diffused impartiality" of the jury. In the interests of the robust jury impartiality guaranteed by the Constitution and the efficient administration of justice, therefore, the Court should decline to adopt such a rule.

---

defense counsel," and that a new trial is warranted if such error results in harm (quotation marks and emphasis omitted).

CONCLUSION

For the foregoing reasons, the judgment of the Eighth Circuit should be affirmed.

Respectfully submitted,

PAUL M. SMITH
Counsel of Record
ISHAN K. BHABHA
CAROLINE M. DECELL
AMIR H. ALI
JENNER & BLOCK LLP
1099 New York Ave., NW
Washington, DC 20001
(202) 639-6000
psmith@jenner.com

Counsel for Amici Curiae

August 13, 2014

AMICUS CURIAE BRIEF

No. 13-517

IN THE

Supreme Court of the United States

GREGORY P WARGER,

Petitioner,

v.

RANDY D. SHAUERS,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

JEFFREY T. GREEN
Co-Chair,
Amicus Committee
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
1660 L Street, N.W.
12th Floor
Washington, DC 20036
(202) 336-5500

LISA S. BLATT
BOB WOOD
ARNOLD & PORTER LLP
555 12th Street, N.W.
Washington, DC 20004
(202) 942-5000

R. REEVES ANDERSON*
Counsel of Record
ARNOLD & PORTER LLP
370 Seventeenth Street
Suite 4400
Denver, CO 80202
(303) 863-1000
Reeves.Anderson@aporter.com

*Member of the Supreme Court bar; not admitted to practice in Colorado

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF *AMICUS CURIAE*	1
ARGUMENT	2
I. RACIAL, ETHNIC, AND RELIGIOUS BIAS AMONG JURORS REMAINS A SERIOUS PROBLEM IN CRIMINAL CASES	2
II. THE CANON OF CONSTITUTIONAL AVOIDANCE REQUIRES ADMITTING EVIDENCE UNDER RULE 606(b) THAT TENDS TO PROVE A LITIGANT DID NOT RECEIVE A FAIR TRIAL	4
A. Rule 606(b) Implicates Core Constitutional Concerns in the Criminal Context	5
B. This Court Should Consider Criminal-Specific Constitutional Concerns In Construing Rule 606(b)	12
CONCLUSION	15

TABLE OF AUTHORITIES

CASES	Page(s)
Chambers v. Mississippi, 410 U.S. 284 (1973)	10, 11
Clark v. Martinez, 543 U.S. 371 (2005)	12
Clark v. United States, 289 U.S. 1 (1933)	11
Commonwealth v. Steele, 961 A.2d 786 (Pa. 2008)	2, 3
Crane v. Kentucky, 476 U.S. 683 (1986)	9
Dyer v. Calderon, 151 F.3d 970 (9th Cir. 1998)	8
Edmonson v. Leesville Concrete Co., 500 U.S. 614 (1991)	5
Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568 (1988)	12
Georgia v. McCollum, 505 U.S. 42 (1992)	5, 10
Gomez v. United States, 490 U.S. 858 (1989)	5
Gray v. Mississippi, 481 U.S. 648 (1987)	7, 8
Green v. Georgia, 442 U.S. 95 (1979)	9-10
Ham v. South Carolina, 409 U.S. 524 (1973)	5, 14

TABLE OF AUTHORITIES—Continued

Page(s)

Hard v. Burlington N. R.R.,
812 F.2d 482 (9th Cir. 1987) 13

Holmes v. South Carolina,
547 U.S. 319 (2006) 5, 9, 10-11

Huddleston v. United States,
485 U.S. 681 (1988) 4

Irvin v. Down,
366 U.S. 717 (1961) 5

McDonald v. Pless,
238 U.S. 264 (1915) 11

McDonough Power Equip., Inc. v. Greenwood,
464 U.S. 548 (1984) 5, 10

Nudd v. Burrows,
91 U.S. 426 (1875) 4

Ortiz v. Fibreboard Corp.,
527 U.S. 815 (1999) 12

Porter v. Illinois,
479 U.S. 898 (1986) 10

Ristaino v. Ross,
424 U.S. 589 (1976) 3

Rock v. Arkansas,
483 U.S. 44 (1987) 10, 11

Rushen v. Spain,
464 U.S. 114 (1983) 13

Rust v. Sullivan,
500 U.S. 173 (1991) 12

TABLE OF AUTHORITIES—Continued

Page(s)

Shillcutt v. Gagnon,
827 F.2d 1155 (7th Cir. 1987) 2

Tanner v. United States,
483 U.S. 107 (1987) 6, 8, 11

Taylor v. Louisiana,
419 U.S. 522 (1975) 7

United States v. Benally,
546 F.3d 1230 (10th Cir. 2008) 2, 8

United States v. Boney,
68 F.3d 497 (D.C. Cir. 1995) 14

United States v. Heller,
785 F.2d 1524 (11th Cir. 1986) 3, 8

United States v. Henley,
238 F.3d 1111 (9th Cir. 2001) 2, 14

United States v. Martinez-Salazar,
528 U.S. 304 (2000) 7

United States v. Shalhout,
507 F. App'x 201 (3d Cir. 2012) 2

United States v. Villar,
586 F.3d 76 (1st Cir. 2009)..... 2, 8, 9

Washington v. Texas,
388 U.S. 14 (1967) 10, 11

Williams v. Price,
343 F.3d 223 (3d Cir. 2003)..... 3

Wright v. United States,
559 F. Supp. 1139 (E.D.N.Y. 1983)..... 9

TABLE OF AUTHORITIES—Continued

Page(s)

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

U.S. Const. amend. VI 6

28 U.S.C. § 2702(b) 12

Fed. R. Evid. 606(b) ..... *passim*

Fed. R. Evid. 606(b)(1) 13

Fed. R. Evid. 606(b)(2) 13

Fed. R. Evid. 1101(b) 4

OTHER AUTHORITIES

Brief for the United States, *Tanner v. United States*, 483 U.S. 107 (1987) (No. 86-177) 8

27 Charles A. Wright & Victor J. Gold, *Federal Practice & Procedure: Evidence* § 6074 (2d ed. 2007) 7, 13

Fed. R. Evid. 606(b) advisory committee's note (1972) 11

Racist Juror Misconduct During Deliberations, 101 Harv. L. Rev. 1595, 1596 (1988) 10

INTEREST OF *AMICUS CURIAE*[1]

The National Association of Criminal Defense Lawyers (NACDL) is the preeminent organization advancing the mission of the criminal defense bar to ensure justice and due process for persons accused of crime or wrongdoing. As a nonprofit, voluntary professional bar association, NACDL represents 40,000 attorneys nationwide, made up of private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL frequently appears as *amicus curiae* before this Court, the federal courts of appeals, and the state supreme courts in cases raising issues of importance to criminal defendants and the defense bar.

In this case, NACDL has an interest in ensuring that the Federal Rules of Evidence are interpreted and applied in a manner consistent with a criminal defendant's constitutional right to a full and fair trial by an impartial jury. Although this case arises in the civil context, this Court's interpretation of Federal Rule of Evidence 606(b) will apply equally to criminal cases. It is thus imperative that the Court understand and account for the substantial criminal-law issues presented by this case.

---

[1] No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No one other than *amicus curiae*, its members, or *amicus*'s counsel made a monetary contribution to the preparation or submission of this brief. Letters from the parties consenting to the filing of this brief have been filed with the Clerk of the Court.

ARGUMENT

I. RACIAL, ETHNIC, AND RELIGIOUS BIAS AMONG JURORS REMAINS A SERIOUS PROBLEM IN CRIMINAL CASES

"Let's be logical. He's black and he sees a seventeen year old white girl—I know the type." *Shillcutt v. Gagnon*, 827 F.2d 1155, 1156 (7th Cir. 1987) (internal quotation marks omitted). "When Indians get alcohol, they get drunk, and . when they get drunk, they get violent." *United States v. Benally*, 546 F.3d 1230, 1231 (10th Cir. 2008) (internal quotation marks omitted). "[T]he defendants [were] guilty because they were of Arabic descent." *United States v. Shalhout*, 507 F. App'x 201, 203 (3d Cir. 2012) (internal quotation marks omitted). "I guess we're profiling but they cause all the trouble." *United States v. Villar*, 586 F.3d 76, 78 (1st Cir. 2009) (internal quotation marks omitted). "All the niggers should hang." *United States v. Henley*, 238 F.3d 1111, 1113 (9th Cir. 2001) (internal quotation marks omitted).

Each of these statements was expressed by a juror during deliberations in a criminal case. Each of these biases escaped detection during voir dire and throughout an ostensibly constitutional trial. And each statement is abhorrent to our judicial system and envelops each trial in an impermeable cloud of doubt. The Court's interpretation of Rule 606(b) in this case will dictate the extent to which criminal defendants and civil litigants alike will be allowed to introduce such evidence of juror bias to challenge the fairness of their trials.

These are by no means isolated incidents. For example, a state court recently considered the effect of a juror's declaration that "race was an issue from the

inception of the trial." *Commonwealth v. Steele*, 961 A.2d 786, 792, 807 (Pa. 2008). A co-juror had "noted the race of three victims and stated that, on that basis alone, the defendant was probably guilty" and should "fry, get the chair or be hung." *Id.* at 807–08 (internal quotation marks omitted).

In another recent case, one juror called another a "nigger lover," a fact the defendant sought to introduce after the verdict. *Williams v. Price*, 343 F.3d 223, 225–35 (3d Cir. 2003) (Alito, J.) (internal quotation marks omitted). The court of appeals "emphasize[d] that [it did] not hold that testimony of the type at issue is inadmissible under Rule 606(b)" but nonetheless felt constrained, under the high standards applicable to habeas actions, to "hold only that the exclusion of such testimony does not contravene or represent an unreasonable application of clearly established federal law." *Id.* at 237.

Religious and ethnic biases, like racial bias, have similarly poisoned the fairness of trials. In one such case, jurors made comments during deliberations such as, "Well, the fellow we are trying is a Jew. I say, 'Let's hang him'"; "you know what the Rabbi came here for, he came to bless Mr. Heller"; and "[H]e is Jewish. We are just going to hang him." *United States v. Heller*, 785 F.2d 1524, 1525–26 (11th Cir. 1986). These examples demonstrate the continuing threat that "justice in a court of law may turn upon the pigmentation of skin, the accident of birth, or the choice of religion." *Ristaino v. Ross*, 424 U.S. 589, 596, n.8 (1976).

Voir dire is the primary method to ferret out impermissible biases and actual prejudice that could prevent parties from receiving a fair trial. But voir dire is an imperfect filter. Jurors are reluctant to reveal—

and are at times even eager to conceal—their conscious biases.

Because jurors harboring virulent racial and religious prejudices can and do slip through voir dire, a court's ability to protect the fairness of criminal proceedings can depend on evidence of statements made during jury deliberations. This case presents a critical opportunity to fortify—or an equally troubling occasion to erode—the Constitution's guarantee that criminal defendants will be tried based on their conduct, not their race or belief system. Protecting the fundamental rights of criminal defendants compels an interpretation of Rule 606(b) that permits a party to introduce evidence that a juror withheld or concealed critical information during voir dire that infected a trial with partiality or other improper influence.

II. THE CANON OF CONSTITUTIONAL AVOIDANCE REQUIRES ADMITTING EVIDENCE UNDER RULE 606(b) THAT TENDS TO PROVE A LITIGANT DID NOT RECEIVE A FAIR TRIAL

Although the interpretation of Rule 606(b) arises here in the context of a civil case, the Court's resolution of the question presented will have equal effect on criminal proceedings. "In general, the rules of evidence are the same in civil and criminal cases." *Nudd v. Burrows*, 91 U.S. 426, 438 (1875); *accord Huddleston v. United States*, 485 U.S. 681, 685 (1988); *see also* Fed. R. Evid. 1101(b). This Court accordingly should account for constitutional arguments unique to the criminal context in interpreting Rule 606(b).

A. Rule 606(b) Implicates Core Constitutional Concerns in the Criminal Context

The Fifth, Sixth, and Fourteenth Amendments guarantee, *inter alia*, the right to an impartial jury and the right to present a complete defense. *See, e.g.*, *Holmes v. South Carolina*, 547 U.S. 319, 324 (2006); *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 554 (1984); *Ham v. South Carolina*, 409 U.S. 524, 526–27 (1973). The Eighth Circuit's interpretation of Rule 606(b)—to bar the admission of juror statements made during deliberations even to show juror dishonesty at voir dire—implicates those rights and raises serious constitutional questions in criminal cases.

1. "One touchstone of a fair trial is an impartial trier—'a jury capable and willing to decide the case solely on the evidence before it.'" *McDonough*, 464 U.S. at 554 (quoting *Smith v. Phillips*, 455 U.S. 209, 217 (1982)). The Sixth Amendment guarantees defendants the "right to be tried by a jury free from ethnic, racial, or political prejudice, or predisposition about the defendant's culpability." *Gomez v. United States*, 490 U.S. 858, 873 (1989) (internal citations omitted). Indeed, the presence of a partial juror "violates even the minimal standards of due process." *Irvin v. Down*, 366 U.S. 717, 722 (1961).

The Constitution guarantees the right to a jury "without racial animus, which so long has distorted our system of criminal justice." *Georgia v. McCollum*, 505 U.S. 42, 58 (1992); *see Ham*, 409 U.S. at 526. While this malady has manifested itself primarily in the criminal context, "[r]acial discrimination has no place in the courtroom, whether the proceeding is civil or criminal." *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 630 (1991).

The Eighth Circuit's interpretation of Rule 606(b) runs headlong into the right to a jury free of partiality. If a juror fails to acknowledge racial or other bias during voir dire, indications of that bias are likely to arise only in statements made during deliberations. Barring jurors from testifying about such statements would effectively foreclose a defendant's best chance to show that prejudice robbed him of a fair trial.

To determine whether the exclusion of juror testimony under Rule 606(b) violates a defendant's Sixth Amendment rights, this Court has assessed the purposes of the rule in relation to the constitutional rights at stake. *Tanner v. United States*, 483 U.S. 107, 119–27 (1987). Rule 606(b) works to ensure "finality" as well as "full and frank discussion in the jury room, jurors' willingness to return an unpopular verdict, and the community's trust in a system that relies on the decisions of laypeople," which "would all be undermined by a barrage of postverdict scrutiny of juror conduct." *Id.* at 120–21. In *Tanner*, those purposes outweighed the threat of juror intoxication because other safeguards at trial—voir dire, the ability of the court and counsel to observe jurors during the trial, the ability of jurors to report misconduct prior to the verdict, and the availability of alternative non-juror evidence to show misconduct—were adequate to protect the defendant's "Sixth Amendment interests in an unimpaired jury." *Id.* at 126–27.

An entirely different set of considerations is at play where, as here, partiality rather than impairment is involved. The "right to a speedy and public trial, by an *impartial* jury" is specifically guaranteed in the Sixth Amendment. U.S. Const. amend. VI (emphasis added). This constitutional right sustains the fairness of the

trial-by-jury process because the very "purpose of a jury is to guard against the . biased response of a judge." *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975).

The potential for partiality and the corresponding strength of the constitutional guarantee guarding against it are especially significant where racial bias is concerned:

> Eradication of the evil of state supported prejudice is at the heart of the Fourteenth Amendment. This suggests that the constitutional interests of the affected party are at their strongest when a jury employs racial bias in reaching its verdict. Racial prejudice undermines the jury's ability to perform its function as a buffer against governmental oppression and, in fact, converts the jury itself into an instrument of oppression. This also suggests that the policy interests behind the enforcement of Rule 606(b) are at their weakest in such a case.

27 Charles A. Wright & Victor J. Gold, *Federal Practice & Procedure: Evidence* § 6074 (2d ed. 2007).

Tanner's concern about jury harassment should not trump the need for jury impartiality, which is "so basic to a fair trial that [its] infraction can never be treated as harmless error." *Gray v. Mississippi*, 481 U.S. 648, 668 (1987) (internal quotation marks omitted). "[T]he seating of any juror who should have been dismissed for cause require[s] reversal." *United States v. Martinez-Salazar*, 528 U.S. 304, 316 (2000). In other words, juror partiality—particularly where it involves racial bias—is a "structural defect" that irretrievably taints a trial, making the need for a complete inquiry into juror impartiality more compelling than with

respect to juror impairment. *Dyer v. Calderon*, 151 F.3d 970, 973 n.2 (9th Cir. 1998).

Concern for "the community's trust in [the judicial] system," *Tanner*, 483 U.S. at 121, also compels a full and fair determination of whether a verdict was rendered based on bias rather than on the merits. "[T]he impartiality of the adjudicator goes to the very integrity of the legal system." *Gray*, 481 U.S. at 668. Precisely because racial, ethnic, and religious prejudice in a jury room "is so shocking to the conscience and potentially so damaging to public confidence in the equity of our system of justice," Rule 606(b) must allow courts to "correct any possible harmful effects" on criminal defendants. *Heller*, 785 F.2d at 1527.

Other "aspects of the trial process," *Tanner*, 483 U.S. at 127, do not adequately protect a defendant from a juror's deeply held biases or actual prejudices. "The judge will probably not be able to identify racist jurors based on trial conduct as easily as he could identify drunken jurors." *Benally*, 546 F.3d at 1240. Indeed, in *Tanner*, the government explicitly drew a distinction between juror incompetence and "juror partiality, which tends to express itself only during jury deliberations and, hence, outside the presence of the trial judge." Brief for the United States at 48, *Tanner*, 483 U.S. 107 (No. 86-177).

Voir dire, too, can be a "feeble protection" against partiality. *Benally*, 546 F.3d at 1240. "While individual pre-trial voir dire of the jurors can help to disclose prejudice, it has shortcomings because some jurors may be reluctant to admit racial bias." *Villar*, 586 F.3d at 87. Moreover, "non-jurors are more likely to report inappropriate conduct—such as alcohol or drug use—among jurors than racial statements

uttered during deliberations." *Id.* Finally, unlike the physical evidence available in *Tanner*, it is difficult to imagine what evidence would be available to show partiality if Rule 606(b) barred probative testimonial evidence.

Given the paramount importance of eliminating bias by juries and the inadequacy of other procedures to combat the issue, "if a criminal defendant could show that the jury was racially prejudiced, such evidence could not be ignored without trampling the Sixth Amendment's guarantee to a fair trial and an impartial jury." *Wright v. United States*, 559 F. Supp. 1139, 1151 (E.D.N.Y. 1983). Many courts have thus refused to apply Rule 606(b) "so inflexibly as to bar juror testimony in those rare and grave cases where claims of racial or ethnic bias during jury deliberations implicate a defendant's right to due process and an impartial jury." *Villar*, 586 F.3d at 87.

2. For similar reasons, Rule 606(b) also implicates the constitutional right to present a complete defense. "Whether rooted directly in the Due Process Clause of the Fourteenth Amendment, or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" *Crane v. Kentucky*, 476 U.S. 683, 690 (1986) (quoting *California v. Trombetta*, 467 U.S. 479, 485 (1984)) (internal citations omitted).

The right to present a defense "is abridged by evidence rules that 'infring[e] upon a weighty interest of the accused' and are 'arbitrary or disproportionate to the purposes they are designed to serve.'" *Holmes*, 547 U.S. at 324 (quoting *United States v. Scheffer*, 523 U.S. 303, 308 (1998)). This right extends beyond the guilt or innocence phase of a trial. *See Green v.*

Georgia, 442 U.S. 95, 97 (1979). This Court has repeatedly confronted, and rejected, proposed applications of evidentiary rules that would violate a criminal defendant's right to present fundamental defenses. *See, e.g.*, *Rock v. Arkansas*, 483 U.S. 44, 55 (1987); *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973); *Washington v. Texas*, 388 U.S. 14, 18 (1967).

Interpreting Rule 606(b) to preclude admission of evidence that a juror lied about his biases at voir dire would infringe a weighty interest. As discussed above, "[t]he right . to an impartial jury lies at the heart of due process," *Porter v. Illinois*, 479 U.S. 898, 900 (1986) (Marshall, J., dissenting from the denial of certiorari), and the right to object to jurors who "would be incapable of confronting and suppressing their racism" is paramount, *McCollum*, 505 U.S. at 58. If a party challenging the effectiveness of voir dire can "demonstrate that a juror failed to answer honestly a material question on voir dire, and then further show that a correct response would have provided a valid basis for a challenge for cause," he is entitled to a new trial. *McDonough*, 464 U.S. at 556.

A defense would be inherently incomplete without the ability to introduce a juror's testimony that another juror revealed unlawful prejudice during deliberations. Again, "the bias of a juror will rarely be admitted by the juror himself," *id.* at 558 (Brennan, J., concurring), and physical evidence is not likely to be available to show bias. Juror testimony regarding deliberations is thus often "the only available evidence [] to establish racist juror misconduct" or other partiality. *Racist Juror Misconduct During Deliberations*, 101 Harv. L. Rev. 1595, 1596 (1988).

Interpreting Rule 606(b) to bar such evidence would be "disproportionate to the ends" the rule is "asserted

to promote." *Holmes*, 547 U.S. at 326. Safeguarding the freedom of deliberations in the jury room, *see Tanner*, 483 U.S. at 120–21, cannot "justify the limitation imposed" on a defendant's right to defend himself on the ground that his trial was fundamentally unfair. *Rock*, 483 U.S. at 56. Not only is the constitutional interest formidable, but the purpose of Rule 606(b) is weakened because the same evidence is admissible in other contexts. *See Washington*, 388 U.S. at 22. Specifically, juror testimony regarding dishonesty at voir dire is admissible in contempt proceedings against the dishonest juror. *See Clark v. United States*, 289 U.S. 1, 12–14 (1933). Admitting testimony of juror bias in order to prosecute a juror while excluding the same testimony where it may be necessary to protect a criminal defendant's constitutional rights would ascribe "absurdity [to] the rule," *Washington*, 388 U.S. at 22, with no attendant benefit to the jury's freedom of deliberation.

Moreover, it has never been the purpose of Rule 606(b) to bar juror testimony where doing so would violate fundamental rights. In establishing the rule, the advisory committee relied on this Court's decision in *McDonald v. Pless*, 238 U.S. 264 (1915), which "recognize[d] that it would not be safe to lay down any inflexible rule because there might be instances in which such testimony of the juror could not be excluded without violating the plainest principles of justice." *Id.* at 268–69 (internal quotation marks omitted); *see* Fed. R. Evid. 606(b) advisory committee's note (1972). Interpreting Rule 606(b) to remove a criminal defendant's ability to prove that his trial was infected with unlawful bias would certainly "violat[e] the plainest principles of justice." *McDonald*, 238 U.S. at 269. Rules should not be applied "mechanistically to defeat the ends of justice." *Chambers*, 410 U.S. at 302.

B. This Court Should Consider Criminal-Specific Constitutional Concerns In Construing Rule 606(b)

Under the Eighth Circuit's interpretation of Rule 606(b)—which would preclude juror testimony revealing bias or partiality concealed during voir dire—criminal defendants would likely be without recourse to defend their fundamental rights to an impartial jury and to a complete defense. That construction of Rule 606(b) presents an apparent conflict with the Rules Enabling Act, which requires that the Federal Rules of Evidence "not abridge, enlarge, or modify any substantive right." 28 U.S.C. § 2702(b). Those constitutional implications also require application of the constitutional avoidance canon. *See Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 845 (1999). "When deciding which of two plausible statutory constructions to adopt, . [i]f one of them would raise a multitude of constitutional problems, the other should prevail—whether or not those constitutional problems pertain to the particular litigant before the Court." *Clark v. Martinez*, 543 U.S. 371, 380–81 (2005). "Indeed, one of the canon's chief justifications is that it allows courts to avoid the decision of constitutional questions." *Id.*

"[T]he elementary rule" of constitutional avoidance "is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality." *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) (internal quotation marks omitted). "This canon is followed out of respect for Congress, which [this Court] assume[s] legislates in the light of constitutional limitations." *Rust v. Sullivan*, 500 U.S. 173, 191 (1991).

Rule 606(b) can be reasonably interpreted to avoid the critical constitutional problems that would follow from excluding evidence of juror bias. Two reasonable interpretations are available that conform to the language and purpose of the rule while also ensuring that criminal defendants will maintain their rights to an impartial jury and to present a complete defense.

First, Rule 606(b) applies only to "an inquiry into the validity of a verdict." Fed. R. Evid. 606(b)(1). Where a party seeks to introduce juror testimony to show juror dishonesty during voir dire, however, "the focus of the motion is the legitimacy of pre-trial procedures, not the validity of the verdict." Wright & Gold, *supra*, § 6074. Indeed, introducing juror testimony showing that a juror failed to disclose bias during voir dire focuses even more broadly, challenging the constitutionality of the entire proceeding. The Court thus must be careful not to conflate the *purpose* of admitting evidence of juror bias (that is, to show a constitutional violation) with its possible remedial *effect* (a new trial). Accordingly, "[s]tatements which tend to show deceit during voir dire are not barred by" Rule 606(b) because they do not come within the coverage of the rule in the first instance. *Hard v. Burlington N. R.R.*, 812 F.2d 482, 485 (9th Cir. 1987).

Second, the exceptions in Rule 606(b) allow admission of statements showing "extraneous prejudicial information" and "outside influence." Fed. R. Evid. 606(b)(1)–(2). Interpreting Rule 606(b), this Court has explained that a "juror may testify concerning any mental bias in matters unrelated to the specific issues that the juror was called upon to decide." *Rushen v. Spain*, 464 U.S. 114, 121 n.5 (1983) (per curiam). Because bias and other prejudices are "unrelated to any specific issue that a juror in a criminal case may

legitimately be called upon to determine," Rule 606(b)'s prohibition should not bar evidence of such bias. *Henley*, 238 F.3d at 1120. Viewed another way, because an individual harboring racial or other prejudicial biases should never have been on the jury, *see, e.g.*, *Ham*, 409 U.S. at 526–27, discussion of that individual's bias "would surely seem to be 'extraneous,' and possibly 'prejudicial' as well." *United States v. Boney*, 68 F.3d 497, 503 (D.C. Cir. 1995).

Adopting either of these interpretations of Rule 606(b) to permit evidence of juror dishonesty during voir dire would be "consistent with the text of the rule, as well as with the broad goal of eliminating racial prejudice from the judicial system." *Henley*, 238 F.3d at 1120.

CONCLUSION

The judgment of the Eighth Circuit should be reversed.

Respectfully submitted,

JEFFREY T. GREEN
Co-Chair,
Amicus Committee
NATIONAL ASSOCIATION
OF CRIMINAL DEFENSE
LAWYERS
1660 L Street, N.W.
12th Floor
Washington, DC 20036
(202) 336-5500

LISA S. BLATT
BOB WOOD
ARNOLD & PORTER LLP
555 12th Street, N.W.
Washington, DC 20004
(202) 942-5000

R. REEVES ANDERSON
Counsel of Record
ARNOLD & PORTER LLP
370 Seventeenth Street
Suite 4400
Denver, CO 80202
(303) 863-1000
Reeves.Anderson@aporter.com

JUNE 3, 2014

AMICUS CURIAE BRIEF

No. 13-517

IN THE

Supreme Court of the United States

GREGORY P. WARGER,
Petitioner,

v.

RANDY D. SHAUERS,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR AMICI CURIAE PROFESSORS OF LAW IN SUPPORT OF PETITIONER

DANIELLE SPINELLI
Counsel of Record
JOSHUA M. SALZMAN
WEILI J. SHAW
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006
(202) 663-6000
danielle.spinelli@wilmerhale.com

QUESTION PRESENTED

Whether Federal Rule of Evidence 606(b) permits a party moving for a new trial based on juror dishonesty during voir dire to introduce juror testimony about statements made during deliberations that tend to show the alleged dishonesty.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES vi

INTEREST OF AMICI CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. VOIR DIRE IS A UNIQUELY AMERICAN INSTITUTION THAT HAS DEVELOPED INTO AN ESSENTIAL GUARANTOR OF THE RIGHT TO A FAIR TRIAL 4

A. English Common Law Had No Equivalent To The American Voir Dire Process 4

1. Common law challenges to jurors 5

2. Ascertaining bases for challenge 6

3. Examination of jurors 7

B. America Developed A Robust Practice Of Voir Dire As An Essential Guarantor Of The Right To An Impartial Jury 10

1. Development of the American model 10

2. Practical motivations 11

3. Voir dire protects the right to an impartial jury and a fair trial 12

II. THE MANSFIELD RULE WAS NOT DESIGNED TO SHIELD DISHONESTY DURING VOIR DIRE THAT WOULD UNDERMINE A LITIGANT'S RIGHT TO AN IMPARTIAL JURY 16

TABLE OF CONTENTS—Continued

Page

A. The Development Of The Mansfield Rule In England 17

B. The Mansfield Rule In America 19

1. Initial adoption and limitations 19

2. The intersection between the Mansfield Rule and voir dire 22

III. RULE 606(b) SHOULD NOT BE INTERPRETED TO EXCLUDE JUROR TESTIMONY REGARDING DISHONESTY DURING VOIR DIRE 27

A. The History Of The Mansfield Rule Is Inconsistent With The Construction Of Rule 606(b) Adopted By The Court Of Appeals 28

B. Rule 606(b) Should Not Be Construed In A Way That Would Threaten The Constitutional Right To An Impartial Jury 29

C. Precluding Evidence Of Dishonesty In Voir Dire Would Undermine Rule 606(b)'s Premise 31

CONCLUSION 32

TABLE OF AUTHORITIES

CASES

Page(s)

Alabama Fuel & Iron Co. v. *Powaski*, 166 So. 782 (Ala. 1936) 24

Aldridge v. *United States*, 283 U.S. 308 (1931) 14, 15

Allison v. *Department of Labor & Industries*, 401 P.2d 982 (Wash. 1965) 24

Almendarez-Torres v. *United States*, 523 U.S. 224 (1998) 29

Batson v. *Kentucky*, 476 U.S. 79 (1986) 8

Board of Trustees of Eloy Elementary School District v. *McEwen*, 430 P.2d 727 (Ariz. Ct. App. 1967) 25

Clark v. *Martinez*, 543 U.S. 371 (2005) 29, 31

Clark v. *United States*, 289 U.S. 1 (1933) 25, 26, 28, 30

Dennis v. *United States*, 339 U.S. 162 (1950) 13

Department of Public Works & Buildings v. *Christensen*, 184 N.E.2d 884 (Ill. 1962) 23

Drury v. *Franke*, 57 S.W.2d 969 (Ky. Ct. App. 1933) 25

Frazier v. *United States*, 335 U.S. 497 (1948) 11

Hinkel v. *Oregon Chair Co.*, 156 P. 438 (Or. 1916) 24

Hyde v. *United States*, 225 U.S. 347 (1912) 21, 22

Hyman v. *Eames*, 41 F. 676 (D. Colo. 1890) 26

TABLE OF AUTHORITIES—Continued

Page(s)

In re Mesner's Estate, 176 P.2d 70 (Cal. Ct. App. 1947) 23

In re Murchison, 349 U.S. 133 (1955) 12

Kiernan v. *Van Schaik*, 347 F.2d 775 (3d Cir. 1965) 11, 12

Mattox v. *United States*, 146 U.S. 140 (1892) 21

McDonald v. *Pless*, 238 U.S. 264 (1915) 17, 22

McDonough Power Equipment, Inc. v. *Greenwood*, 464 U.S. 548 (1984) 12, 13, 29

McNally v. *Walkowski*, 462 P.2d 1016 (Nev. 1969) 23

Midlantic National Bank v. *New Jersey Department of Environmental Protection*, 474 U.S. 494 (1986) 28

Miles v. *United States*, 103 U.S. 304 (1880) 14

Morgan v. *Illinois*, 504 U.S. 719 (1992) 15, 16

Orenberg v. *Thecker*, 143 F.2d 375 (D.C. Cir. 1944) 24

People v. *Reyes*, 5 Cal. 347 (1855) 14

Perkins v. *LeCureux*, 58 F.3d 214 (6th Cir. 1995) 30

Pinder v. *State*, 8 So. 837 (Fla. 1891) 14

Rosales-Lopez v. *United States*, 451 U.S. 182 (1981) 13, 14, 15, 16

Smith v. *Phillips*, 455 U.S. 209 (1982) 12

TABLE OF AUTHORITIES—Continued

Page(s)

State by Lord v. *Hayden Miller Co.*, 116 N.W.2d 535 (Minn. 1962) 23

Swain v. *Alabama*, 380 U.S. 202 (1965) 8, 11

Tanner v. *United States*, 483 U.S. 107 (1987) 13, 28, 31, 32

Thiel v. *Southern Pacific Co.*, 328 U.S. 217 (1946) 12

Turner v. *Murray*, 476 U.S. 28 (1986) 12, 14

United States ex rel. Owen v. *McMann*, 435 F.2d 813 (2d Cir. 1970) 24

United States v. *Duzac*, 622 F.2d 911 (5th Cir. 1980) 31

United States v. *Reid*, 53 U.S. 361 (1851) 19, 20

United States v. *Wood*, 299 U.S. 123 (1936) 13

Wilson v. *Wiggins*, 94 P.2d 870 (Ariz. 1939) 24

Woodworth v. *Kansas City Public Service Co.*, 274 S.W.2d 264 (Mo. 1955) 25

Wright v. *I&M Telegraph*, 20 Iowa 195 (1866) 20, 21

FOREIGN CASES

Anonymous, 91 Eng. Rep. 141 (K.B. 1691) 9

King v. *Edmonds*, 106 Eng. Rep. 1009 (K.B. 1821) 9

Vaise v. *Delaval*, 99 Eng. Rep. 944 (K.B. 1785) 17, 18

TABLE OF AUTHORITIES—Continued

Page(s)

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. VI 12

RULES

Federal Rule of Evidence 606(b) ..... *passim*

OTHER AUTHORITIES

Allen, W.W., *Admissibility, In Civil Case, Of Juror's Affidavit Or Testimony To Show Bias, Prejudice Or Disqualification Of A Juror Not Disclosed On Voir Dire Examination*, 48 A.L.R.2d 971 (1956) 24

Babcock, Barbara Allen, *Voir Dire: Preserving 'Its Wonderful Power,'* 27 Stan. L. Rev. 545 (1975) 13

3 Blackstone, Sir William, *Commentaries on the Laws of England* (Wendell ed. 1852) 5, 6, 7, 8, 9

Coke, Edward, *Commentary Upon Littleton* (19th ed. 1853) 5, 9

Comment, *Impeachment of Jury Verdicts*, 25 U. Chi. L. Rev. 360 (1958) 26

Crump, Susan, *Jury Misconduct, Jury Interview, and the Federal Rules of Evidence: Is the Broad Exclusionary Principle of Rule 606(b) Justified?*, 66 N. Car. L. Rev. 509 (1988) 30

Hans, Valerie P. & Neil Vidmar, *The Evolution of the American Jury* (1986) 5

TABLE OF AUTHORITIES—Continued

Page(s)

Hunter, Jill, *Jury Deliberations and the Secrecy Rule: The Tail That Wags The Dog?*, 35 Sydney L. Rev. 8096 (2013) 17

Millar, Robert Wyness, *Civil Procedure of the Trial Court in Historical Perspective* (2005) 6, 7, 8, 10, 11

Miller, Colin, *Dismissed with Prejudice: Why Application of the Anti-Jury Impeachment Rule to Allegations of Racial, Religious, or Other Bias Violates the Right to Present a Defense*, 61 Baylor L. Rev. 872 (2009) 30

Moore, Roger D., *Voir Dire Examination of Jurors: I. The English Practice*, 16 Geo. L.J. 438 (1927-1928) 8

Peake, Thomas, *Law of Evidence* (Am. ed. 1812) 7

Rogers, Henry Wade, *Impeachment of Verdicts for Misconduct* (1881), Faculty Scholarship Series Paper 4049, http://digitalcommons.law.yale.edu/fss_papers/4049 21

Russ, Arthur A., Jr., Recent Case, *Evidence—Affidavit Concerning Jurors' Unauthorized View Inadmissible As Ground For New Trial*, 15 Buff. L. Rev. 217 (1965) 24

8A Wigmore, John Henry, *Treatise on the Anglo-American System of Evidence in Trials at Common Law* (3d ed. 1961) 17, 18, 19, 26

TABLE OF AUTHORITIES—Continued

Page(s)

27 Wright, Charles Alan & Victor James Gold, *Federal Practice & Procedure* (2d ed. 2007) 18, 30

IN THE

Supreme Court of the United States

No. 13-517

GREGORY P. WARGER,
Petitioner,

v.

RANDY D. SHAUERS,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR AMICI CURIAE PROFESSORS OF LAW IN SUPPORT OF PETITIONER

INTEREST OF AMICI CURIAE

Amici are professors of law who have written extensively on the history of the jury, the Federal Rules of Evidence, and the right to an impartial jury. Amici accordingly have a scholarly interest in the historical background and proper resolution of the question presented here.[1]

[1] Letters consenting to the filing of this amicus brief have been filed with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no person other than amici or their counsel made a monetary contribution to the preparation or submission of this brief.

Amici are:

- Neil Vidmar, Russell M. Robinson II Professor of Law, Duke Law School
- Lisa Kern Griffin, Professor of Law, Duke Law School

SUMMARY OF ARGUMENT

This case requires the Court to consider the intersection of two distinct practices: (1) the American tradition of allowing litigants to inquire into the biases of potential jurors through voir dire and giving litigants the right to seek relief when a juror fails to disclose a bias and is wrongly empaneled, and (2) the historical rule barring jurors from disclosing the contents of their deliberations in order to impeach their verdicts, which is now codified in Federal Rule of Evidence 606(b), but which at common law was known as the Mansfield Rule. A review of the history and purposes of these two practices reveals that the latter was never intended to trump or undermine the former.

Voir dire in its present American form was essentially unknown in England. While jurors in England could be challenged for cause, litigants were allowed to examine jurors about their biases only in limited circumstances. By contrast, America has developed a robust commitment to voir dire, which has proven to be essential to the American jury selection process. In at least some cases, it has been recognized as a constitutionally required element of the right to an impartial jury.

The Mansfield Rule, by contrast, was first articulated in England before the American tradition of voir dire had developed, by judges who accordingly could not have contemplated that the rule would extend to shielding evidence of juror dishonesty during voir dire. The

rule originally arose from the now discredited belief that witnesses should not be permitted to testify to their own turpitude. And although American courts adopted the Mansfield Rule in narrowed form to serve other goals, it has never been viewed as an absolute prohibition on juror testimony. To the contrary, this Court and others have consistently recognized that the rule's objectives—shielding the jury's deliberations from scrutiny and promoting finality of verdicts—must yield in appropriate cases to fundamental principles of fairness. Indeed, in the years leading up to the adoption of the Federal Rules of Evidence, a substantial body of caselaw held that the Mansfield Rule does not bar the admission of jurors' statements during deliberations to show dishonesty during voir dire.

In light of the distinct histories and policies underlying voir dire and the Mansfield Rule, this Court should construe Rule 606(b) not to preclude admission of juror testimony to prove that a juror lied during voir dire and thus should never have been empaneled in the first place. Absent a clear contrary indication, the rules of evidence should be presumed to have adopted the common-law understanding of the Mansfield Rule. And nothing in Rule 606(b)'s drafting history suggests that Congress intended to repudiate the long-standing recognition that testimony regarding dishonesty in voir dire falls outside the scope of the Mansfield Rule. Moreover, given the central role that voir dire plays in exposing juror bias—including insidious racial bias—a contrary interpretation would needlessly raise grave constitutional concerns. The core constitutional right to a fair and impartial jury militates against such a reading of Rule 606(b). Finally, the privilege accorded jury deliberations exists only because of safeguards such as voir dire that ensure an impartial jury; Rule 606(b)

should not be construed to undermine the basic guarantee of a fair and unbiased jury on which it rests.

ARGUMENT

I. VOIR DIRE IS A UNIQUELY AMERICAN INSTITUTION THAT HAS DEVELOPED INTO AN ESSENTIAL GUARANTOR OF THE RIGHT TO A FAIR TRIAL

Under the English common law, there was no equivalent to the current American practice of voir dire; the right to interrogate potential jurors was quite circumscribed. By contrast, American law has long recognized that litigants must have the right to question jurors, and obtain truthful answers, to ensure that prospective jurors are free of bias and otherwise able to fulfill their duties. Indeed, voir dire is a pillar of the American jury system and a fundamental safeguard of the right to a fair and impartial jury.

A. English Common Law Had No Equivalent To The American Voir Dire Process

Voir dire in its modern American form—the examination of jurors under oath to discover potential bases for challenge—was largely unknown in the English common law. That is not to say that juror challenges did not exist. Although such challenges were rarely exercised, the common law did permit litigants to challenge jurors for cause. Where English common law differed from the modern American system, however, is in the method by which litigants ascertained potential bases for challenge. Voir dire, the centerpiece of that process in the United States and a crucial guarantor of an impartial jury, did not exist in England in its modern American form, and questioning of prospective jurors played only a minimal role in English practice.

1. Common law challenges to jurors

At common law, the jurors in the *panel* (or "little pane," an "oblong piece of parchment" containing jurors' names)—were generally selected by the sheriff. 3 Blackstone, *Commentaries on the Laws of England* 353, 358-359 (Wendell ed. 1852); *see also* Hans & Vidmar, *The Evolution of the American Jury* 35 (1986). The sheriff returned the panel to the court "many weeks" prior to trial so that the litigants could familiarize themselves with the jurors and determine whether to challenge any jurors for cause. 3 Blackstone, *Commentaries* 355.

The common law contained a complex taxonomy of challenges for cause.[2] Challenges "to the array" alleged partiality on the part of the sheriff or other person that arrayed the panel. 3 Blackstone, *Commentaries* 359. Such a challenge was to all the persons on the panel and could result in quashing the entire array. *Id.*; Coke, *Commentary Upon Littleton* 156a (19th ed. 1853) (*Coke on Littleton*).[3] Challenges "to the polls," by contrast, were "exceptions to particular jurors." 3 Blackstone, *Commentaries* 359, 361.

One ground for challenge to the polls was "suspicion of bias or partiality." 3 Blackstone, *Commentaries* 363; *see also Coke on Littleton* 156b-158b. Such chal-

---

[2] Peremptory challenges were also available, at least in criminal cases. *See Coke on Littleton* 156b.

[3] Such challenges were limited in cases against the Crown. Coke explained that "where the king is partie, one shall not challenge the array for favour, &c. because in respect of his allegiance [the sheriff] ought to favour the king more." *Coke on Littleton* 156a; *see also* Hans & Vidmar, *supra*, at 35.

lenges fell into two categories. "Principal" challenges could be raised when there were "*prima facie* evident marks of suspicion" that a juror might be biased, such as the juror's kinship with a party. 3 Blackstone, *Commentaries* 363. Challenges "to the favor," by contrast, could be raised "where the party hath no principal challenge; but objects only some probable circumstances of suspicion, as [a juror's] acquaintance [with a party] and the like." *Id.*

2. Ascertaining bases for challenge

"[T]he common-law rule provided for no preliminary examination [of jurors] in advance of challenge[.]" Millar, *Civil Procedure of the Trial Court in Historical Perspective* 291 (2005). Instead, litigants had to rely on personal knowledge or independent investigation to ascertain potential grounds for challenging a juror, and were able to question jurors only *after* a challenge had been raised.[4]

"[B]y the policy of the ancient law, the jury was to come *de vicineto*, from the neighborhood of the vill or place where the cause of action was laid in the declaration[.]" 3 Blackstone, *Commentaries* 359. The rationale was that jurors from the neighborhood "were supposed to know beforehand the character of the parties and witnesses, and therefore ... better knew what credit to give to the facts alleged in evidence." *Id.* By the same token, litigants knew, or could easily investigate, potential jurors' reputations. Making the panel available to the parties well in advance of trial was

---

[4] *Cf. id.* (noting rare cases to the contrary but explaining that "these instances involved departure from established rule," a "deviation ... definitely discountenanced in the later practice").

therefore an essential element of the jury-selection process, ensuring that "the parties ... have notice of the jurors, and of their sufficiency or insufficiency, characters, connections, and relations, that so they may be challenged upon just cause." *Id.* at 355.

Although the geographic restrictions of the "ancient law" loosened over time, 3 Blackstone, *Commentaries* 359-360, the method for challenging jurors did not:

> The theory today is the same as stated by Peake at the opening of the nineteenth century, in his work on Evidence: "The pannell," he says, "is made out and known to the parties long before the trial; they have an opportunity of inquiring as to the characters and course of life of the persons named in it; and if they find anything which destroys the competency of a juror, they may be prepared to prove it."

Millar, *supra*, at 292 (quoting Peake, *Law of Evidence* 141 (Am. ed. 1812)).

3. Examination of jurors

Under the English common law, examination of jurors under oath did not serve its modern American purpose of uncovering potential bases for challenge. Instead, it played a far more limited role in jury selection.

At common law, challenges alleging bias or partiality for reasons that were not grounds for a principal challenge were decided by "triors" appointed by the court. These triors heard evidence and decided "whether the juror be favorable or unfavorable." 3 Blackstone,

Commentaries 363.[5] As part of this process, the juror could in some circumstances "be examined on oath of *voir dire, veritatem dicere.*" *Id.* at 364. Such examinations were rare, however, for three reasons.

First, as discussed above, examination of jurors was permitted only *after* a challenge, and such challenges were rarely made. Millar, *supra*, at 292. That continues to be the case today. "In the modern English practice challenges continue to be possible, but very seldom are interposed, and only in the rare event of a challenge can there be any ... examination of the juror." *Id.*; *see also Swain* v. *Alabama*, 380 U.S. 202, 218-220 (1965) (noting that "in England ... both peremptory challenge and challenge for cause have fallen into disuse"), *overruled on other grounds by Batson* v. *Kentucky*, 476 U.S. 79 (1986).

Second, even in the event of a challenge, examination of jurors did not always occur. Litigants had to rely on extrinsic evidence to ascertain any causes for challenge in the first place, and could rely on the same evidence to prove the cause. Moreover, as one annotation to Blackstone observed of English practice, "[c]hallenges are seldom tried; the officer of the court, upon the objection being intimated to him, refrains from calling the juror." 3 Blackstone, *Commentaries* 331 n.19.

Third, examination of jurors was permitted only as to "such causes of challenge as are not to [the juror's] dishonor or discredit; but not with regard to any crime, or any thing which tends to his disgrace or disad-

---

[5] Once a sufficient number of jurors were seated, the jurors themselves became the triors. *Id.*; *see also* Moore, *Voir Dire Examination of Jurors: I. The English Practice*, 16 Geo. L.J. 438, 443 (1927-1928) (describing procedure for deciding challenge).

vantage." 3 Blackstone, *Commentaries* 364; *Coke on Littleton* 158b ("If the cause of challenge touch the dishonor or discredit of the juror, he shall not be examined upon his oath[.]").

The scope of this prohibition was surprisingly broad. Notably, the prohibition extended to whether a juror had expressed a prior opinion regarding a case. In Cook's case, for example, the defendant sought to question jurors as to whether "they had ... said he was guilty, or would be hanged." *Anonymous*, 91 Eng. Rep. 141 (K.B. 1691). The court ruled that "[t]his is a good cause of challenge, but then the prisoner must prove it by witnesses, not out of the mouth of the juryman," as such a statement "would charge [the juror] with misdemeanor or misbehaviour." *Id.* The defendant could not inquire, the court explained, as to that which "would make a man discover that of himself which tends to shame, crime, infamy, or misdemeanor." *Id.*

Similarly, the defendant in *King* v. *Edmonds*, 106 Eng. Rep. 1009, 1016 (K.B. 1821), sought to challenge jurors "on the ground of opinions supposed to have been expressed by those gentlemen hostile to the defendants and their cause." The defendant did not "offer to prove such an expression, by any extrinsic evidence, but ... proposed to obtain the proof, by questions put to the jurymen themselves." *Id.* The court held that it was proper to "refuse[] to allow such questions to be answered," reasoning that "it is a very dishonourable thing for a man to express ill-will towards a person accused of a crime, in regard to the matter of his accusation." *Id.* at 1017.

Accordingly, jurors were rarely questioned during the jury selection process. Such questioning occurred only in the unusual circumstance in which (1) a litigant

raised a challenge to a juror after ascertaining grounds for the challenge through personal knowledge or investigation; (2) the litigant sought to prove the grounds for the challenge through testimony from the juror; and (3) the cause of challenge did not tend to the juror's "dishonor or discredit."

B. America Developed A Robust Practice Of Voir Dire As An Essential Guarantor Of The Right To An Impartial Jury

Voir dire in its modern American form bears little resemblance to the English model described above and could hardly have been contemplated by the likes of Coke, Blackstone, and Mansfield. In America, voir dire has developed into a critical part of the jury-selection process and a key guarantor of the right to an impartial jury.

1. Development of the American model

The precise origins of the American practice of voir dire are unclear. But as early as the 1807 trial of Aaron Burr, "Chief Justice Marshall had no difficulty in allowing extensive examination of jurors as to their previous opinion of the guilt of the accused." Millar, *supra*, at 292-293. Such inquiry would have been prohibited under English practice because it entailed both (1) questioning jurors before any challenge had been raised and (2) questioning jurors about prior statements regarding the defendant's guilt.

Nonetheless, "it came to be accepted in most of the American jurisdictions ... that a preliminary questioning of the jurors on the voir dire, for the purpose of ascertaining whether a challenge would be in order, was a definite right of the parties." Millar, *supra*, at 292. American practice also diverged in other significant ways from the British example. American voir dire al-

lows "a much wider field of inquiry than was permitted at common law." *Id.* "The voir dire in American trials tends to be extensive and probing, ... and the process of selecting a jury protracted." *Swain*, 380 U.S. at 218-220. The prohibition on examining jurors as to causes that tend to their "dishonor and discredit" likewise fell by the wayside. *See* Millar, *supra*, at 292.

2. Practical motivations

The dramatic expansion of voir dire in American practice was rooted in part in the necessities of jury trials in a large and heterogeneous country. The English practice developed in a society in which jurors were likely to come from the same neighborhood as the litigants. Litigants could therefore rely on personal knowledge of potential jurors or their reputations as a basis for making challenges.

In modern times, however, litigants in U.S. courts are unlikely to have any personal knowledge of potential jurors or any practical ability to conduct meaningful investigation of jurors' backgrounds independent of voir dire. In *Frazier* v. *United States*, 335 U.S. 497, 503 (1948), for example, it appears that jurors were selected from a pool of over five hundred. It is hardly feasible—at least for litigants of average means—to conduct any meaningful investigation of such a large number of potential jurors. Moreover, courts have recognized that even if such inquiries were possible, they would be less desirable than the more transparent voir dire process. *See Kiernan* v. *Van Schaik*, 347 F.2d 775, 778-780 (3d Cir. 1965) ("The impartiality of jurors should be tested under the control of the court rather than by the unsupervised activity of investigators with all the undesirable possibilities of intimidation and jury tampering which such surveillance inevitably presents.").

3. Voir dire protects the right to an impartial jury and a fair trial

Even more significant than these practical considerations, however, has been the recognition that meaningful voir dire is essential to protecting the constitutional right to a fair trial.

"One touchstone of a fair trial is an impartial trier of fact—'a jury capable and willing to decide the case solely on the evidence before it.'" *Smith* v. *Phillips*, 455 U.S. 209, 217 (1982). Indeed, the Sixth Amendment expressly protects criminal defendants' right to a trial "by an impartial jury." U.S. Const. amend. VI. And although the Seventh Amendment, which guarantees the right to trial by jury for civil litigants in federal court, does not include similar language, this Court has recognized that "[t]he American tradition of trial by jury, considered in connection with *either criminal or civil proceedings*, necessarily contemplates an impartial jury drawn from a cross-section of the community." *Thiel* v. *Southern Pac. Co.*, 328 U.S. 217, 220 (1946) (emphasis added); *see also Kiernan*, 347 F.2d at 778 ("Amendment VII preserves 'the right of trial by jury' in civil cases, and although the impartiality of the jury is not expressly mentioned it is inherent in the right of trial by jury[.]"); *cf. McDonough Power Equip., Inc.* v. *Greenwood*, 464 U.S. 548, 549 (1984) (relying on "right to an impartial jury").

"The right to an impartial jury is" also "guaranteed ... by principles of due process." *Turner* v. *Murray*, 476 U.S. 28, 53 (1986); *see also In re Murchison*, 349 U.S. 133, 136 (1955) ("A fair trial *in a fair tribunal* is a basic requirement of due process." (emphasis added)); *Kiernan*, 347 F.2d at 778 (impartial jury right is implicit in the Fifth Amendment's due process clause).

"*Voir dire* examination serves to protect [the impartial jury] right by exposing possible biases, both known and unknown, on the part of potential jurors." *McDonough*, 464 U.S. at 554; *see also Tanner* v. *United States*, 483 U.S. 107, 127 (1987) (describing voir dire as a "source[] of protection of petitioners' right to a competent jury").[6] "Without an adequate voir dire the trial judge's responsibility to remove prospective jurors who will not be able impartially to follow the court's instructions and evaluate the evidence cannot be fulfilled." *Rosales-Lopez* v. *United States*, 451 U.S. 182, 188 (1981); *see also id.* at 188 ("Voir dire plays a critical function in assuring the criminal defendant that his Sixth Amendment right to an impartial jury will be honored."); Babcock, *Voir Dire: Preserving 'Its Wonderful Power,'* 27 Stan. L. Rev. 545, 549 (1975) ("[W]ithout a reasonable amount of information about the prospective jurors, the litigant cannot realize his right to 'select' the jury by challenges for cause and by peremptory strikes.").

Voir dire is particularly essential as a mechanism for revealing racial, religious, and like forms of prejudice. As this Court long ago recognized, voir dire is critical in ferreting out those especially insidious forms of prejudice: "[T]he juror best knows the condition of his

---

[6] *See also United States* v. *Wood*, 299 U.S. 123, 133-134 (1936) (finding juror qualification statute did not violate Sixth Amendment right to impartial jury because "[a]ll persons otherwise qualified for jury service are subject to examination as to actual bias" and "[a]ll the resources of appropriate judicial inquiry remain available ... to ascertain whether a prospective juror, although not exempted from service, has any bias in fact which would prevent his serving as an impartial juror"); *Dennis* v. *United States*, 339 U.S. 162, 171-172 (1950) ("Preservation of the opportunity to prove actual bias is a guarantee of a defendant's right to an impartial jury.").

own mind" as to such biases, and thus "no satisfactory conclusion" about the juror's impartiality "can be arrived at, without resort to [the juror] himself." *Aldridge* v. *United States*, 283 U.S. 308, 313 n.3 (1931) (quoting *People* v. *Reyes*, 5 Cal. 347, 349 (1855)).[7] Racial prejudice, for example, is "a fact ... of the most vital import to the defendant." *Id.* at 313 n.1. But that prejudice, "if existent, [is] locked up entirely within the breasts of the jurors," and can be determined "only ... by interrogating the juror himself." *Id.* (*quoting Pinder* v. *State*, 8 So. 837, 838 (Fla. 1891)). Where voir dire shows that a juror "entertain[s] a prejudice which would preclude his rendering a fair verdict, a gross injustice would be perpetrated in allowing him to sit." *Id.* at 314.

This Court has accordingly held that the Constitution itself imposes "requirements with respect to questioning prospective jurors about racial or ethnic bias." *Rosales-Lopez*, 451 U.S. at 189-190. Specifically, a defendant has a constitutional right to "inquire into possible racial prejudice" when there are "substantial indications of the likelihood of racial or ethnic prejudice affecting the jurors in a particular case." *Id.* at 190.[8]

---

[7] *See also Miles* v. *United States*, 103 U.S. 304, 309-311 (1880) ("It is evident from the examination of the jurors on their voire dire, that they believed that polygamy was ordained of God, and that the practice of polygamy was obedience to the will of God.... It needs no argument to show that a jury composed of men entertaining such a belief could not have been free from bias or prejudice on the trial for bigamy, of a person who entertained the same belief, and whose offence consisted in the act of living in polygamy.").

[8] This Court has required additional protections in various circumstances. "[A] capital defendant accused of an interracial crime is entitled to have prospective jurors informed of the race of the victim and questioned on the issue of racial bias." *Turner* v.

Moreover, this Court has recognized that the importance of such inquiries outweighs any concern—which in part animated the English common-law restrictions on voir dire—about examining jurors in ways that could bring them into disrepute. As the Court explained in *Aldridge*:

> The argument is advanced on behalf of the government that it would be detrimental to the administration of the law in the courts of the United States to allow questions to jurors as to racial or religious prejudices. We think that it would be far more injurious to permit it to be thought that persons entertaining a disqualifying prejudice were allowed to serve as jurors and that inquiries designed to elicit the fact of disqualification were barred. No surer way could be devised to bring the processes of justice into disrepute.

283 U.S. at 314-315.

Voir dire's role as the guarantor of an impartial jury is not confined to instances of racial bias or prejudice. In capital cases, for example, defendants are entitled to voir dire to identify "those biased persons on the venire who as jurors would unwaveringly impose death after a finding of guilt." *Morgan* v. *Illinois*, 504 U.S.

Murray, 476 U.S. 28, 36-37 (1986). This Court also requires, as part of its "supervisory authority over the federal courts," that "questions directed to the discovery of racial prejudice be asked in certain circumstances in which such an inquiry is not constitutionally mandated." *Rosales-Lopez*, 451 U.S. at 190. For example, "federal trial courts must make such an inquiry when requested by a defendant accused of a violent crime and where the defendant and the victim are members of different racial or ethnic groups." *Id.* at 192.

719, 733 (1992). "Were *voir dire* not available to lay bare the foundation of petitioner's challenge for cause" in such circumstances, the defendant's right to an impartial jury "would be rendered ... nugatory and meaningless." *Id.* at 733-734.

In sum, voir dire of a sort that would have been barred under the English common-law rule is now essential to the American jury selection process. Under the common-law rule, a litigant would have had to determine whether to challenge jurors for prejudice based entirely on extrinsic evidence, without the benefit of voir dire. And even after such a threshold challenge was made, voir dire could have been barred under the rule prohibiting inquiries that tend to the juror's "dishonor or discredit." In the modern American system, by contrast, voir dire regarding juror bias or prejudice is a matter of constitutional right in appropriate cases, *see Rosales-Lopez*, 451 U.S. at 189-190—a dramatic departure from the English common law.

II. THE MANSFIELD RULE WAS NOT DESIGNED TO SHIELD DISHONESTY DURING VOIR DIRE THAT WOULD UNDERMINE A LITIGANT'S RIGHT TO AN IMPARTIAL JURY

While voir dire in its present form is an American innovation, the common-law predecessor to Rule 606(b)—the Mansfield Rule—was imported from England and originated before the American practice of voir dire had taken its current form. As originally formulated, the Mansfield Rule thus did not contemplate the unique problems posed by juror dishonesty during voir dire, or the constitutional implications of precluding inquiry into such dishonesty. In any event, the Mansfield Rule has never been understood, either as it was first articulated in England or as it was later applied in the United States, as an absolute bar to the admission of

evidence regarding the content of jury deliberations. To the contrary, in the period leading up to the adoption of Rule 606(b), numerous American courts recognized that juror testimony establishing dishonesty in voir dire falls outside the ambit of the Mansfield Rule.

A. The Development Of The Mansfield Rule In England

The common-law restriction on testimony regarding the content of jury deliberations dates from 1785, when the Mansfield Rule was first announced. Before then, "the unquestioned practice had been to receive jurors' testimony ... without scruple ... [and] proof of [misconduct] was received equally from jurors and others without discrimination." 8A Wigmore, *Treatise on the Anglo-American System of Evidence in Trials at Common Law* § 2352 n.2 (3d ed. 1961) (collecting a dozen pre-1785 cases in which juror affidavits were accepted); *see also McDonald* v. *Pless*, 238 U.S. 264 (1915) ("Prior to 1785 a juror's testimony was sometimes received, though always with great caution.").

The Mansfield Rule is generally traced to Lord Mansfield's seminal decision in *Vaise* v. *Delaval*, 99 Eng. Rep. 944 (K.B. 1785). In that case, two jurors submitted affidavits stating that the jury had decided the case by "tossing up," *i.e.*, by tossing a coin. Lord Mansfield rejected the testimony, concluding that jurors could not testify to their own misconduct. The Mansfield Rule was soon widely adopted in England, and it is still followed throughout the British Commonwealth. *See* Hunter, *Jury Deliberations and the Secrecy Rule: The Tail That Wags The Dog?*, 35 Sydney L. Rev. 809, 814-816 (2013).

As Lord Mansfield originally formulated it, the rule against considering juror testimony that the jury had decided the case through improper means was not related to protecting the integrity of jury verdicts or the secrecy of the jury. Instead, it was rooted in the principle that such testimony by a juror was unreliable because any witness who testifies to his own turpitude is inherently untrustworthy.[9] Indeed, Lord Mansfield suggested that a jury verdict *could* be challenged based on the content of the jurors' deliberations if the witness testifying that the case was decided by a coin toss was a passerby who saw the coin toss through a window, rather than a juror. *Vaise*, 99 Eng. Rep. at 944 ("The Court cannot receive such an affidavit from any of the jurymen themselves, in all of whom such conduct is a high misdemeanor[,] but in every such case the Court must derive their knowledge from some other source[,] such as from some person having seen the transaction through a window or by some such other means." (footnote omitted)); *see also* 27 Wright & Gold, *Federal Practice & Procedure* § 6074 (2d ed. 2007) ("Lord Mansfield's rule applied only to statements offered by the juror directly to the court; testimony from court officers or eavesdroppers as to what jurors said during deliberations was not excluded."). Thus, the Mansfield Rule as originally articulated was in no way designed to privilege the secrecy of jury deliberations over the basic guarantee of an impartial jury, but only to exclude a type of evidence that was then thought to be particularly unreliable.

---

[9] Lord Mansfield advocated the position that witnesses cannot testify to their own turpitude in many other unrelated contexts, but in all other contexts it was ultimately "utterly repudiated, in both England and America." Wigmore, *supra*, § 2352.

Moreover, the Mansfield Rule was, of course, announced well before the American institution of voir dire had developed. Neither Lord Mansfield nor the many Commonwealth courts that followed his rule could have envisioned either voir dire in its modern American form or the importance of voir dire to fair trials in the modern American justice system. It is thus unsurprising that amici are aware of no English cases from this period applying (or declining to apply) the Mansfield Rule in evaluating the admissibility of testimony regarding a juror's false statements during voir dire. Nor does it appear that the major treatises of the time ever considered whether the Mansfield Rule would appropriately apply in such a scenario.

B. The Mansfield Rule In America

1. Initial adoption and limitations

In the first half of the nineteenth century, apparently on the strength of the prestige of Lord Mansfield, the rule barring jurors from testifying to their deliberations was widely adopted in America. *See* Wigmore, *supra*, § 2352 (attributing adoption of the Mansfield Rule to the "prestige of the Great Chief Justice" and stating that "its authority came to receive in the United States an adherence almost unquestioned").

Over the course of the second half of the nineteenth century and into the twentieth century, however, while there was significant variation among jurisdictions, American courts increasingly recognized that the Mansfield Rule was not absolute and would yield to fundamental principles of fairness. In *United States* v. *Reid*, 53 U.S. 361 (1851), for example, this Court confronted the Mansfield Rule for the first time. In that case, the defendant sought to introduce jurors' affida-

vits stating that they had seen newspaper articles discussing the case. The *Reid* Court ultimately sidestepped the question of the Mansfield Rule's application on the ground that the articles appeared not to have influenced the jury's verdict. But, while noting that jurors' testimony about their deliberations "ought always to be received with great caution," the Court noted that "cases might arise in which it would be impossible to refuse [to admit such testimony] without violating the plainest principles of justice." *Id.* at 366.

The Iowa Supreme Court recognized such a limitation on the Mansfield Rule in the 1866 case of *Wright* v. *I&M Telegraph*, 20 Iowa 195. The court held that juror testimony regarding aspects of jury deliberations that "essentially inhere" in the verdict—such as jurors' misunderstanding of evidence or use of questionable reasoning in reaching a verdict—could not be admitted as a basis for obtaining a new trial. *Id.* at 209-210. By contrast, testimony regarding aspects of deliberations that did not inhere in the verdict—such as the jury's use of an improper process, *e.g.*, a coin toss, to arrive at a verdict—could be admitted. *Id.* at 210. *Wright* accordingly permitted the admission of juror testimony that the case had been decided by a "quotient" verdict (*i.e.*, by averaging the award of damages preferred by each juror).

The Iowa court rejected the logic of *Vaise*, observing that "if, as is universally conceded, it is the *fact* of improper practice, which avoids the verdict, there is no reason why a court should close its ears to the evidence of it from one class of persons [*i.e.*, the jurors], while it will hear it from another class [*i.e.*, eavesdroppers], which stands in no more enviable light and is certainly no more entitled to credit." *Wright*, 20 Iowa at 212. And the court emphasized the importance of fairness to

the litigants, concluding that "there can be no sound public policy which should prevent a court from hearing the best evidence of which the matter is susceptible, in order to administer justice to the party whose rights have been prejudiced" by the jury misconduct. *Id.*

Other courts followed the Iowa rule or identified other exceptions to or limitations on the Mansfield Rule. By 1881, there were "several cases" that "held that the affidavits of jurors may be received" in some circumstances in support of a motion for a new trial. Rogers, *Impeachment of Verdicts for Misconduct* (1881).[10]

This Court later addressed the Mansfield Rule in a trio of cases, each of which reiterated the basic principle that the Mansfield Rule was not absolute, but could be trumped by considerations of fairness. In *Mattox* v. *United States*, 146 U.S. 140 (1892), the Court considered juror testimony that during deliberations in a murder trial, the jury had read a highly prejudicial newspaper article and had been told by the bailiff that the victim was the third person the defendant had killed. The Court concluded that a new trial was required, emphasizing that "public policy, which forbids the reception of the ... statements of jurors to impeach their verdicts, may, in the interest of justice, create an exception to its own rule." *Id.* at 148.

In *Hyde* v. *United States*, 225 U.S. 347 (1912), the Court considered allegations that the jurors had reached a compromise verdict, trading acquittal of two defendants for conviction of two others. The Court cit-

---

[10] Faculty Scholarship Series, Paper 4049, http://digitalcommons.law.yale.edu/fss_papers/4049 (collecting cases).

ed *Wright* with approval, adopting the "inhere in the verdict" terminology announced in in that case. However, it applied that framework somewhat differently than the Iowa Supreme Court, concluding that the allegations of compromise, even if true, would merely establish facts that essentially inhere in the verdict, and thus could not form a basis for challenge. *Id.* at 383-384.

Finally, in *McDonald* v. *Pless*, 238 U.S. 264 (1915), the Court considered the same question presented in *Wright*—whether juror evidence of a quotient verdict should be admitted—and held that it should not. *Id.* at 267-268. The Court did not, however, disturb its holding in *Hyde* that the Mansfield Rule applies only to juror testimony regarding matters that inhere in the verdict. And the Court reiterated *Reid*'s admonition that the Mansfield Rule should not be applied inflexibly in a manner that infringed on basic principles of justice. *Id.* at 268-269.

2. The intersection between the Mansfield Rule and voir dire

In the first half of the twentieth century, courts began to grapple with the intersection between voir dire and the Mansfield Rule. When confronted with a conflict between the two, courts in many jurisdictions concluded that ensuring honesty in voir dire should trump the Mansfield Rule. As one commentator explained:

> Cases from several jurisdictions have taken the position that affidavits or testimony of jurors, even though disclosing matters occurring in the jury room, may be received in support of a motion or petition for a new trial, where offered, and operating, to show the existence of bias or

> prejudice of a juror, or a fact grounding a challenge of the juror for cause, concealed on his voir dire examination notwithstanding well-directed questions were put to him touching such matters.

Allen, *Admissibility, In Civil Case, Of Juror's Affidavit Or Testimony To Show Bias, Prejudice Or Disqualification Of A Juror Not Disclosed On Voir Dire Examination*, 48 A.L.R.2d 971 § 2 (1956).

Although the law on this question was by no means uniform, a substantial body of caselaw emerged from a wide variety of jurisdictions recognizing that the Mansfield Rule did not apply to cases in which evidence regarding a jury's deliberations was offered to establish that a juror had failed to disclose bias during voir dire. As one court articulated the rule, "Affidavits of jurors may be received as to ... the deliberations of the jury which tend to prove the existence of prejudice in the mind of a juror, which would prevent his acting as an impartial juror, where the state of mind is charged to have been entertained and to have been intentionally concealed during his voir dire examination." *In re Mesner's Estate*, 176 P.2d 70, 76 (Cal. Ct. App. 1947); *see also Department of Public Works & Buildings* v. *Christensen*, 184 N.E. 2d. 884, 887 (Ill. 1962) ("Although [the Mansfield] doctrine is generally recognized, it is subject to an exception when it is charged that a juror has answered falsely on voir dire about a matter of potential bias or prejudice."); *State by Lord* v. *Hayden Miller Co.*, 116 N.W.2d 535, 539 (Minn. 1962) ("The privilege which protects the deliberations of the jury from exposure does not extend to statements of jurors who may have on voir dire concealed prejudice or bias which would have disqualified them[.]"); *McNally* v. *Walkowski*, 462 P.2d 1016, 1019 (Nev. 1969) ("[T]he jurors' affidavits

were admissible for the limited purpose of showing concealment of actual bias by several of the jurors on their voir dire examination."); *Allison* v. *Department of Labor & Indus.*, 401 P.2d 982, 984 (Wash. 1965); Russ, Recent Case, *Evidence—Affidavit Concerning Jurors' Unauthorized View Inadmissible As Ground For New Trial*, 15 Buff. L. Rev. 217, 220 & n.29 (1965) (collecting New York cases showing that "[j]urors' affidavits have also been accepted, in support of a motion for new trial, to disclose a juror's concealed prejudice on *voir dire*, on the ground that due to his partiality he was never eligible to become a member of the jury").[11]

To be sure, some cases held that juror affidavits disclosing the jury's deliberations could not be admitted even to show dishonesty during voir dire. *See, e.g., Wilson* v. *Wiggins*, 94 P.2d 870, 871-872 (Ariz. 1939); *Hinkel* v. *Oregon Chair Co.*, 156 P. 438, 439 (Or. 1916); *see also* Allen, *supra*, § 2 (collecting cases). However, even many of the courts that were generally unwilling to accept such evidence recognized that concealed bias during voir dire threatens the fundamental right to a fair trial and requires special treatment. Thus, while Missouri, Arizona, and Kentucky courts refused to accept juror affidavits disclosing the contents of deliberations to show that

---

[11] *See also United States ex rel. Owen* v. *McMann*, 435 F.2d 813, 819-821 (2d Cir. 1970) (considering juror testimony that disclosed content of deliberations where testimony established juror bias); *Orenberg* v. *Thecker*, 143 F.2d 375, 376-377 (D.C. Cir. 1944) (apparently assuming that evidence from jurors showing fraudulent juror statements during voir dire could be considered on motion for new trial, but finding no such evidence); *Alabama Fuel & Iron Co.* v. *Powaski*, 166 So. 782, 786-788 (Ala. 1936) (allowing admission of juror affidavits to establish misconduct on voir dire, but only if a prima facie case of misconduct was first established using evidence external to the jury).

other jurors had been dishonest in voir dire, all of them held that a juror's testimony regarding that juror's *own* concealed bias was admissible in support of a motion for a new trial. *See Woodworth* v. *Kansas City Pub. Serv. Co.*, 274 S.W.2d 264, 270-271 (Mo. 1955); *Board of Trustees of Eloy Elem. Sch. Dist.* v. *McEwen*, 430 P.2d 727, 731-734 (Ariz. Ct. App. 1967); *Drury* v. *Franke*, 57 S.W.2d 969, 984 (Ky. Ct. App. 1933).[12]

The position that the Mansfield Rule does not preclude evidence of a juror's dishonesty during voir dire was substantially buttressed by this Court's decision in *Clark* v. *United States*, 289 U.S. 1 (1933). There, the Court held that testimony regarding the content of deliberations is admissible in a subsequent proceeding against a juror for contempt resulting from dishonesty during voir dire, and that the general rule privileging the secrecy of jury deliberations had no application in such a case. The Court explained that "[i]f [a juror's] answers to the [voir dire] questions are willfully evasive or knowingly untrue, the talesman, when accepted, is a juror in name only. His relation to the court and to the parties is tainted in its origin; it is a mere pretense and sham." *Id.* at 11. That is, a juror who lied during

---

[12] These cases specifically recognized the importance of voir dire to ensuring an impartial trial. *See Kansas City Pub. Serv. Co.*, 274 S.W.2d at 270-271 ("It is the duty of a venireman on voir dire examination to fully, fairly and truthfully answer all questions, so that challenges may be intelligently exercised, and the venireman's intentional concealment of a material fact may require the granting of a new trial."); *Drury*, 57 S.W.2d at 984 (noting that a litigant may be "entitled to a new trial because a juror gave a false answer, or no answer, to a pertinent question addressed to him on the voir dire examination" and that "the right [to] challenge [a juror] includes the incidental right that the information elicited on the voir dire examination shall be true").

voir dire should never have been seated on the jury in the first place. Admitting evidence regarding the juror's misstatements thus did not improperly intrude into the jury's deliberations, but preserved the core guarantee of an impartial jury.

Although *Clark* arose in the context of contempt proceedings, its logic was clearly applicable to cases in which a litigant sought a new trial based on a juror's dishonesty during voir dire. Indeed, *Clark* itself noted that the rule that "the testimony of a juror is not admissible for the impeachment of his verdict" is "not without exception," and cited *Hyman* v. *Eames*, 41 F. 676 (D. Colo. 1890)—a case in which juror testimony regarding the content of deliberations was admitted to show that a juror had concealed bias during voir dire—as an example. *Clark*, 289 U.S. at 18. In *Hyman*, the court held that when "considering the competency of [a challenged juror] to sit as a juror ... the testimony of his associates may be received." 41 F. at 677-678.

After *Clark*, several courts drew the obvious parallel and concluded that if juror testimony was admissible for purposes of punishing a dishonest juror, it should logically be admissible to remedy the consequences of the juror's dishonesty in a proceeding to determine whether a litigant should receive a new trial. *See* Pet. Br. 29 (collecting cases). The 1961 edition of Wigmore's treatise likewise endorsed the proposition that juror testimony should be admissible to establish dishonesty during voir dire. As Wigmore explained, "the privilege [against introduction of juror testimony] ceases where the inquiry concerns a crime *committed by the juror prior to the jury's retirement*, e.g., perjury in answering questions on the voir dire." Wigmore, *supra*, § 2354 (emphasis in original). Overall, the weight of authority was such that a commentator in 1958 concluded: "If a

juror's remarks during deliberations indicate that he has given false answers or has concealed relevant information on the voir dire, it is *settled* that the verdict may be impeached"—that is, that testimony regarding the jury's deliberations could be admitted in support of a motion for a new trial. Comment, *Impeachment of Jury Verdicts*, 25 U. Chi. L. Rev. 360, 367-368 n.53 (1958) (emphasis added).

III. Rule 606(b) Should Not Be Interpreted To Exclude Juror Testimony Regarding Dishonesty During Voir Dire

The history of, and policies underlying, the Mansfield Rule and the American practice of voir dire strongly support the conclusion that Rule 606(b) does not bar admission of juror testimony regarding the content of deliberations to show dishonesty during voir dire. As discussed above, the English common-law regime that created the Mansfield Rule did not accord voir dire the same central place as a guarantor of core constitutional rights that it occupies in this country; American courts have always recognized that fundamental principles of fairness trump the Mansfield Rule; and the rule was widely understood not to bar juror testimony showing dishonesty during voir dire. There is no indication whatever that the drafters of Rule 606(b) intended to depart from these principles, and Rule 606(b) should be construed to harmonize with, rather than to repudiate, long-settled common law.

Moreover, construing Rule 606(b) to bar admission of testimony relating to juror dishonesty during voir dire would trench upon the basic right to an impartial jury. Such a construction would thus raise grave constitutional concerns. It would also be at war with the premises on which Rule 606(b) is predicated. For these

reasons, too, the court of appeals' reading of Rule 606(b) should be rejected.

A. The History Of The Mansfield Rule Is Inconsistent With The Construction Of Rule 606(b) Adopted By The Court Of Appeals

As this Court recognized in *Tanner* v. *United States*, 483 U.S. 107 (1987), "Federal Rule of Evidence 606(b) is grounded in the common-law rule against admission of jury testimony to impeach a verdict and the exception for juror testimony relating to extraneous influences." *Id.* at 121. "The normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific." *Midlantic Nat'l Bank* v. *New Jersey Dep't of Envtl. Prot.*, 474 U.S. 494, 501 (1986). Therefore, unless the drafters clearly indicated a contrary intent, Rule 606(b) should be read to codify the Mansfield Rule as it was applied and understood at the time the Federal Rules of Evidence were adopted—that is, as not barring introduction of a juror's testimony regarding statements made during deliberations that show juror dishonesty during voir dire.

As petitioner ably demonstrates, neither the text nor the legislative history of Rule 606(b) reveals any such contrary intent. By its terms, the rule addresses only an "inquiry into the *validity of a verdict*," not an inquiry into the composition of the jury. Fed. R. Evid. 606(b) (emphasis added). As this Court recognized in *Clark*, a juror who lies during voir dire "is a juror in name only." 289 U.S. at 11. Accordingly, a challenge to the seating of that juror is not an inquiry into the validity of the jury's verdict. Indeed, Rule 606(b)'s legislative and drafting history reflect no consideration of juror dishonesty during voir dire. Nor is there any indication

that Congress intended to reject the substantial body of caselaw holding that juror testimony establishing that a juror was dishonest during voir dire does not fall within the scope of the Mansfield Rule. *See* Pet. Br. 30-35. Rule 606(b) should accordingly be interpreted to permit admission of evidence of juror dishonesty during voir dire.

B. Rule 606(b) Should Not Be Construed In A Way That Would Threaten The Constitutional Right To An Impartial Jury

Moreover, interpreting Rule 606(b) to preclude juror testimony regarding dishonesty during voir dire would conflict with the fundamental constitutional right to an impartial jury. Rule 606(b) need not, and should not, be so interpreted. Under the constitutional avoidance canon, "[a] statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score." *Almendarez-Torres* v. *United States*, 523 U.S. 224, 237 (1998). The canon "rest[s] on the reasonable presumption that Congress did not intend" an interpretation "which raises serious constitutional doubts." *Clark* v. *Martinez*, 543 U.S. 371, 381 (2005).

As discussed in Part I.B.3, *supra*, voir dire is a key safeguard of the right to an impartial jury—explicitly guaranteed in the Sixth Amendment and inherent in the Seventh Amendment and Due Process Clause—because it enables the litigants and the court to screen out biased jurors (including racially or religiously prejudiced jurors). When jurors intentionally conceal partiality or prejudice, the right to a fair trial that has always been understood as providing a limit on the Mansfield Rule is threatened. *See McDonough Power Equip., Inc.* v. *Greenwood*, 464 U.S. 548, 554 (1984)

("The necessity of truthful answers by prospective jurors if [voir dire] is to serve its purpose is obvious.").

Numerous commentators have recognized the potential constitutional concerns that would arise if defendants were denied a remedy for verdicts that are the product of biased jurors who would not have been empaneled had they responded honestly during voir dire. *See, e.g.*, Miller, *Dismissed with Prejudice: Why Application of the Anti-Jury Impeachment Rule to Allegations of Racial, Religious, or Other Bias Violates the Right to Present a Defense*, 61 Baylor L. Rev. 872, 880-881 (2009); *Federal Practice & Procedure* § 6074 (noting that "there is a serious problem in using Rule 606(b) to exclude all testimony of jury bias. Democratic institutions like the jury can produce oppression when the majority uses its values to demean the rights of minorities."); Crump, *Jury Misconduct, Jury Interviews, and the Federal Rules of Evidence: Is the Broad Exclusionary Principle of Rule 606(b) Justified?*, 66 N.C. L. Rev. 509, 524 (1988) ("A disturbing context involving the issue of jury misconduct ... occurs when a juror manifests racial bias during deliberations.").

In many cases, statements made during jury deliberations will be the only evidence of dishonesty during voir dire. As a result, prohibiting testimony about the content of deliberations will often leave litigants with no remedy for a trial by a jury that did not satisfy constitutional standards for impartiality. *See Perkins* v. *LeCureux*, 58 F.3d 214 (6th Cir. 1995) (Jones, J., concurring) ("The rule of juror incompetency cannot be applied in such a manner as to deny due process."); *cf. Clark*, 289 U.S. at 12-14 (juror privilege against testifying about deliberations does not apply where the juror was seated on false pretenses because maintaining the

privilege in those circumstances "is paying too high a price for the assurance to a juror of serenity of mind").

Of course, not every question asked during voir dire would uncover prejudice of the kind that amounts to a denial of the constitutional right to an impartial jury. But as this Court has observed, the constitutional avoidance canon is a tool for "choosing between competing plausible interpretations of a statutory text," not a "method of adjudicating constitutional questions by other means." *Clark*, 543 U.S. at 381. Thus, "[i]t is not at all unusual to" impose "a limiting construction called for by one of the statute's applications, even though other of the statute's applications, standing alone, would not support the same limitation." *Id.* at 380. As this Court has recognized, there is a significant set of cases in which barring a litigant from demonstrating that a juror lied during voir dire would amount to denial of the core right to a fair trial by an impartial jury. *See supra* Part I.B.3. Rule 606(b) should not be construed to permit that result.

C. Precluding Evidence Of Dishonesty In Voir Dire Would Undermine Rule 606(b)'s Premise

Finally, construing Rule 606(b) to preclude juror testimony about dishonesty in voir dire would undermine a basic premise of that rule.

It is only the existence of a robust voir dire process—the key safeguard of an impartial jury—that justifies deferring to the jury's verdict and generally barring inquiry into the jury's deliberative process. As this Court made clear in *Tanner*, "the protection of jury deliberations from intrusive inquiry" rests on the assumption that "[t]he suitability of an individual for the responsibility of jury service ... is examined during *voir*

dire." 483 U.S. at 127; *see also, e.g., United States* v. *Duzac*, 622 F.2d 911, 913 (5th Cir. 1980) (upholding the rule against admitting testimony that jurors' "personal prejudices were not put aside during deliberations" on the ground that "[t]he proper time to discover such prejudices is when the jury is being selected and peremptory challenges are available to attorneys.").

Voir dire's "protection of [the] right to a competent jury," *Tanner*, 483 U.S. at 127, is a predicate on which Rule 606(b) is premised and the rule can only be properly understood in that light. Rule 606(b) should not be construed in a manner that weakens the efficacy of the voir dire safeguard by denying litigants a remedy for dishonesty during voir dire, and thereby undercuts the rule's foundation.

CONCLUSION

The Eighth Circuit's judgment should be reversed and the case remanded for further proceedings.

Respectfully submitted.

DANIELLE SPINELLI
Counsel of Record
JOSHUA M. SALZMAN
WEILI J. SHAW
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 663-6000
danielle.spinelli@wilmerhale.com

JUNE 2014